No. 82-1666

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ISMENE M. KALARIS, Administrative Appeals Judge,
and
JULIUS MILLER, Administrative Appeals Judge,
Petitioners,

v.

RAYMOND J. DONOVAN, Secretary of Labor,
MALCOLM R. LOVELL, JR., Under Secretary of Labor, and
ROBERT L. RAMSEY, Chief Administrative Appeals Judge,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether efforts of the Secretary of Labor to dismiss summarily the judicial officers who compose the Benefits Review Board violate the Board's organic statute (33 U.S.C. § 921(b)) and the constitutional principles of separation of powers and due process of law.

2. Whether the judicial officers who compose the Benefits Review Board enjoy tenure protection under Article III of the federal constitution.*

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* All parties to the case below are named in the caption of this Petition. Under Secretary Lovell left office March 1, 1983. No successor has been named.

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This is a petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit upholding the power of the Secretary of Labor to remove, without cause, the judicial officers who compose the Benefits Review Board established by 33 U.S.C. § 921(b) (1976 and Supp. IV 1980). Petitioners are the members of the Board the Secretary is attempting to dismiss.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 697 F.2d 376 and is printed as Appendix A to this Petition (pp. 1a-48a, *infra*). The Court of Appeals reversed an injunction against Petitioners' removal from the Board

that had been entered by the U.S. District Court for the District of Columbia. The District Court's opinion, which is unreported, is printed as Appendix B (pp. 49a-56a, *infra*).

JURISDICTION

The judgment of the Court of Appeals sought to be reviewed was entered January 4, 1983, and is included in Appendix C to this Petition (pp. 57a-58a, *infra*). On February 18, 1983, Petitioners timely filed in the Court of Appeals a petition for rehearing and suggestion for rehearing en banc. The court denied the petition and suggestion by separate orders filed March 7, 1983; these orders are also included in Appendix C (pp. 59a-60a, *infra*).[1]

The jurisdiction of this Court to review the judgment of the Court of Appeals by writ of certiorari rests upon 28 U.S.C. § 1254(1) (1976). *See also* 28 U.S.C. § 2101(c) (1976) and Sup. Ct. R. 20.4.

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS INVOLVED

This case involves Article III of, and the Due Process Clause of the Fifth Amendment to, the Constitution. It also involves provisions of the Longshoremen's and Harbor Workers' Compensation Act, in particular, 33 U.S.C. §§ 921, 939 (1976 and Supp. IV 1980), and regulations of the Department of Labor, in particular, 20 C.F.R. §§ 801.103, 801.104, and 801.201 (1982). The pertinent text of this material is set forth verbatim in Appendix D (pp. 61a-70a, *infra*).

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[1] By order dated March 18, 1983, the Court of Appeals stayed issuance of its mandate for 30 days pending the filing of this Petition. *See* Fed. R. App. P. 41(b). The rule in the District of Columbia Circuit is that a stay of mandate pending a petition for certiorari is appropriate where the court is satisfied that the petition will present substantial questions to this Court. Deering Milliken, Inc. v. FTC, 647 F.2d 1124 (D.C. Cir. 1978); Washington Metropolitan Area Transit Comm'n v. Holiday Tours, Inc., 559 F.2d 841 (D.C. Cir. 1977). Petitioners remain in office pursuant to this stay.

STATEMENT OF THE CASE

Petitioners are judges of the Benefits Review Board established in 1972 by amendment to the Longshoremen's and Harbor Workers' Compensation Act (the "LHWCA") to perform appellate review in federal workers' compensation cases. The Board is a three-member tribunal that hears and determines appeals in cases between private litigants that arise under the LHWCA and other federal statutes. *See* 33 U.S.C. § 921(b)(1) (1976).[2] The basic question presented by this Petition is whether, as the Court of Appeals held, the Secretary of Labor may fire the judges of this Board at will or whether, as we will show, decisions of this Court, the LHWCA itself and the Constitution bar the Executive from asserting such authority over members of this independent judicial tribunal.

The Board was created in 1972 when Congress revamped the procedures for resolution of disputed LHWCA claims and separated the executive and judicial functions under the statute. Before the 1972 amendments, facts were tried before a federal administrative officer,[3] with appellate review by U.S. District Courts, the Courts of Appeals and this Court. The 1972 amendments provided for trial by a hearing examiner (later, administrative law judge), created the Board and transferred to it the

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[2] In addition to the LHWCA, the statutes that make up the Board's subject matter jurisdiction include the Federal Coal Mine Health and Safety Act of 1972, 30 U.S.C.A. § 932 (Supp. 1982); Defense Base Act, 42 U.S.C. § 1651 *et seq.* (1976 and Supp. IV 1980); District of Columbia Workers' Compensation Act, 36 D.C. Code § 501 *et seq.* (1981); Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* (1976 and Supp. IV 1980); Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171 *et seq.* (1976 and Supp. V 1981).

[3] At the outset, the administrative hearing officer was a deputy commissioner of the U.S. Employees Compensation Commission, an independent agency. 39 Stat. 748 (1916). By 1972, the deputy commissioners were housed in the Department of Labor.

same review function the District Courts had previously performed. Appendix A, pp. 5a-8a, *infra*.

The Board determines appeals from decisions of administrative law judges, ruling on questions of law and applying a substantial evidence test to findings of fact. 33 U.S.C. § 921(b)(3) (1976 and Supp. IV 1980). Its orders must be based on the hearing record. *Id.* It exercises no administrative, legislative, investigatory or other nonjudicial function. *McCluskey* v. *Zeigler Coal Co.*, 2 Black Lung Rptr. 1-1248, at 1-1253 (Ben. Rev. Bd. 1981). Review of its orders is available in the courts of appeals (33 U.S.C. § 921(c)) and in this Court,[4] but the Board is not a party to the appellate proceedings. *See* p. 8, *infra*.

The statute provides that the "Board shall be composed of three members appointed by the Secretary from among individuals who are especially qualified to serve on such Board." 33 U.S.C. § 921(b)(1) (1976). It contains no provision expressly establishing either a term of appointment for Board members or a power of removal for the Secretary.

By regulation implementing the 1972 amendments, the Secretary directed that the Board operate as "an independent quasi-judicial body in accordance with the provisions of the statute." 38 Fed. Reg. 6171, 6172 (1973), *now* 20 C.F.R. § 801.104 (1982). *See also* 20 C.F.R. § 801.103 (1982) (functions of Board are "quasi-judicial").[5] The

[4] This Court has fully reviewed a number of decisions of the Board in recent years. Director, OWCP v. Perini N. River Assoc., 103 S. Ct. 634 (1983); United States Indus. v. Director, OWCP, 102 S. Ct. 1312 (1982); Potomac Elec. Power Co. v. Director, OWCP, 449 U.S. 268 (1980); P. C. Pfeiffer Co. v. Ford, 444 U.S. 69 (1979); Director, OWCP v. Rasmussen, 440 U.S. 29 (1979); Northeast Marine Terminal Co. v. Caputo, 432 U.S. 249 (1977). It has relied on both majority and dissenting opinions of the Board. Director, OWCP v. Rasmussen, *supra*.

[5] Other official statements of the Labor Department, submitted with Petitioners' summary judgment motion in the District Court, also emphasize the "completely independent" nature of the Board's

Department's regulations further provide that the Secretary, through a delegate, the Director, Workers' Compensation Programs, participates in proceedings before the Board and on appeal of its decisions to the courts of appeal. 20 C.F.R. §§ 801.2(10), 802.201(a), 802.410(b) (1982).[6] Through his delegate, the Secretary is a party in interest in a substantial number of cases heard by the Board. Appendix B, p. 50a, *infra*. By his regulations, the Secretary also asserted discretion to determine the length of Board members' terms. 20 C.F.R. § 801.201(d) (1982).

Judge Miller was appointed to the Board in 1974 and Judge Kalaris was appointed in 1978. On April 30, 1982, they were informed by Under Secretary Lovell that they were to be removed from the Board a month hence. Appendix A, p. 8a, *infra*.[7] No member of the Board had ever been dismissed before, and no reason was given for the removals here. *Id.*[8] For whatever reason—or for

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work. *E.g.*, Appendix E, p. 72a, *infra* (excerpt from the Department's position description for Board members). In its Justification for Classification of Supergrade Position for Board members, also in the record below, the Department said that the Board serves as a "constitutional court." *See* Appendix A, p. 31a n.70 *infra*.

[6] The Secretary's delegate, the Director, has a "central role in the legislative and regulatory scheme . . . ." Shahady v. Atlas Tile & Marble Co., 673 F.2d 479, 482 (D.C. Cir. 1982). He participates in LHWCA proceedings "to ensure proper and consistent administration of the Act" (*id.* at 483) and in cases involving the liability of a fund he administers under 33 U.S.C. § 944 (1976). *See also* 30 U.S.C.A. §§ 932, 934 (Supp. 1982).

[7] Petitioners were subsequently informed that they were to be transferred to the Department's Office of the Solicitor at like grade and salary. *See* Appendix A, at p. 9a n.23, *infra*.

[8] As the court below noted, the record contained several possible explanations for the dismissals. Appendix A, at p. 8a n.21, *infra*. Petitioners' uncontradicted affidavits in the District Court described a meeting with the Board's newly appointed Chief Judge in which he told Petitioners that he had made their removal a condition of his acceptance of his new position. *See* Appendix A, p. 8a n.21, *infra*. The new Chief Judge did not object to Petitioners' fitness

none at all—the Secretary simply wanted his own appointees on the Board.

Judge Kalaris filed her complaint in the District Court for the District of Columbia May 7, 1982 and Judge Miller filed his May 21, 1982.[9] The parties agreed that the question of the Secretary's power to remove, without cause, the judicial officers of the Board presented no issue of material fact and made cross motions for summary judgment.

By order dated June 2, 1982, the District Judge granted Petitioners' motion and permanently enjoined the Secretary from removing or attempting to remove Petitioners from the Board without showing cause. Appendix B, pp. 55a-56a, *infra*. On the authority of this Court's decisions in *Wiener* v. *United States*, 357 U.S. 349 (1958) and *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), she ruled that the Board was an independent quasi-judicial tribunal whose members could not be dismissed summarily by an Executive officer. Appendix B, pp. 49a-54a, *infra*.

The Court of Appeals reversed the injunction "because we find that Congress did not intend to make the Board independent of the Secretary . . . ." Appendix A, p. 3a, *infra*. It added:

> "We hold to the long-standing rule that in the face of congressional silence all inferior officers of the United States serve at the discretion of their appointing officer." Appendix A, pp. 3a-4a, *infra*.

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as judges—there has never been a claim that Petitioners are not fit to serve—but he did object to their opinions. *See id.* and material cited therein.

Neither of the lower courts received evidence in this case, and the Court of Appeals found that no explanation for dismissal of Petitioners had been substantiated. Appendix A, at p. 8a n.21.

[9] The jurisdiction of the District Court was based on 28 U.S.C. §§ 1331, 1346, and 1361 (1976 and Supp. IV 1980). Judge Miller's complaint was filed the day after he was told that his veteran's rights would not bar his removal from the Board.

REASONS FOR ALLOWING THE WRIT

I. This Case Presents Important Questions of Statutory and Constitutional Law That This Court Should Review On Certiorari.

Controversy surrounding the scope and application of the power of an Executive officer to remove those he appoints already "fills a thick chapter of our political and judicial history." *Wiener* v. *United States*, 357 U.S. 349, 351 (1958) (Frankfurter, J.). In this case, the controversy specifically involves the asserted right of the Secretary of Labor to remove members of the Benefits Review Board, a purely adjudicatory tribunal housed within the Department of Labor. For the reasons outlined below and amplified in Sections II-V, the Court should grant the writ and set this case for plenary consideration on the merits. *See* Sup. Ct. R. 17.1.

The case squarely raises for decision by this Court—for the first time in the ten years since the Board was created—a question that cuts to the core of the scheme Congress designed for, and the quality of justice rendered in, the thousands of civil appeals filed with the Board each year.[10] The court below based its decision on its conclusion that Congress did not intend to make the Board independent of the Secretary (Appendix A, p. 3a, *infra*), and, by holding that the Secretary may remove Board members without cause, it effectively destroyed the Board's status as an independent tribunal. As this Court has explained,

> "it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." [11]

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[10] *See* Kicklighter v. Ceres Terminal, Inc., 13 Ben. Rev. Bd. Serv. 109, 126, *aff'd mem.*, 665 F.2d 1040 (4th Cir. 1981) (appeals presented to Board averaging "well over 200 per month").

[11] Humphrey's Executor v. United States, 295 U.S. 602, 629 (1935); *accord*, Wiener v. United States, 357 U.S. 349, 353 (1958); *see id.* at 356, suggesting that "the Damocles' sword of removal"

In fact, there is nothing now to prevent the Secretary from placing on the Board judges who are expected to, and understand that they are to, adopt the positions advanced to them by the Secretary's delegate, the Director, Office of Workers' Compensation Programs.[12]

The question whether Congress meant the Board to be independent merits review by this Court. Ever since the Board was created, the courts of appeals have agonized over basic issues regarding the nature of the Board and of its relationship to the Secretary.[13] Some courts have compared the Board to the district courts (from which its functions were transferred) and held that, unlike an administrative agency, the Board should not participate in appellate proceedings to review its orders.[14] Some cases

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represents an even greater threat to independent decision-making than the power to influence determination of particular claims. *See also* K. Davis, *Administrative Law of the Seventies*, § 1.09 at 13-14 (1976).

[12] The Secretary clearly believes he has such power. In his Reply Brief to the Court of Appeals (at 14), he claimed that the LHWCA authorizes him to make Board decisions subject to his instructions. The Court of Appeals did not expressly rule on this claim, but it did accept that its decision would "permit the Secretary . . . to influence claims decisions outside the adjudicatory process through replacement of the entire Board." Appendix A, p. 39a, *infra*, quoting the District Court's opinion, Appendix B, p. 51a, *infra*.

[13] For example, in Shahady v. Atlas Tile & Marble Co., 673 F.2d 479, 482 n.2 (D.C. Cir. 1982), the court noted that decisions of the courts of appeals as to the proper role of the Director and the Board in review proceedings under 33 U.S.C. § 921(c) (1976) "run the entire gamut of possibilities." It noted particular splits over the Board's role (*id.* at 485 n.9) and over the question whether the Director has standing to appeal a Board decision. *Id.* at 483 n.6.

[14] Director, OWCP v. Eastern Coal Corp., 561 F.2d 632, 648-49 (6th Cir. 1977); Krolick Contracting Corp. v. Benefits Review Bd., 558 F.2d 685, 688-89 (3d Cir. 1977); Nacirema Operating Co. v. Benefits Review Bd., 538 F.2d 73, 75 (3d Cir. 1976); Offshore Food Serv., Inc. v. Benefits Review Bd., 524 F.2d 967 (5th Cir. 1975); McCord v. Benefits Review Bd., 514 F.2d 198, 200 (D.C.

have treated the Board as an administrative agency to which courts should defer, and others have not.[15] One court has said that neither the Director nor the Board is entitled to much deference in interpreting the 1972 amendments since neither administers the statute.[16] Another has said the Director should be deferred to, but the Board should not be.[17] A third court holds that the Board's views are entitled to *greater* weight,[18] and reviewing courts (including, on one occasion this Court) have routinely affirmed the Board's rejection of the Director's position on legal issues.[19] The Ninth Circuit has squarely held that the Secretary cannot dictate to the

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Cir. 1975). *See also* Ingalls Shipbuilding Div'n, Litton Sys., Inc. v. White, 681 F.2d 275, 281-84 (5th Cir. 1982). *But see* Prolerized New England Co. v. Benefits Review Bd., 637 F.2d 30, 40-41 (1st Cir. 1980), *cert. denied*, 452 U.S. 938 (1981).

[15] *Compare* Stevenson v. Linens of the Week, 688 F.2d 93, 98 n.6 (D.C. Cir. 1982), *and* National Steel & Shipbuilding Co. v. Bonner, 600 F.2d 1288, 1292 (9th Cir. 1979), *with* Walker v. Universal Terminal & Stevedoring Corp., 645 F.2d 170, 172-73 & n.3 (3d Cir. 1981), *and* Bumble Bee Seafoods v. Director, OWCP, 629 F.2d 1327, 1329 (9th Cir. 1980). *See also* Dravo Corp. v. Maxin, 545 F.2d 374, 380 n.7 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977), noting "mixed results" of decisions on this point.

[16] Director, OWCP v. O'Keefe, 545 F.2d 337, 343 (3d Cir. 1976).

[17] Miller v. Central Dispatch, Inc., 673 F.2d 773, 779 n.12 (5th Cir. 1982). *See also* Perkins v. Marine Terminals Corp., 673 F.2d 1097, 1104 (9th Cir. 1982).

[18] Stockman v. John J. Clark & Son of Boston, Inc., 539 F.2d 264, 269-70 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

[19] *E.g.*, Director, OWCP v. Rasmussen, 440 U.S. 29 (1979); Director, OWCP v. Beatrice Pocahontas Coal Co., 698 F.2d 680 (4th Cir. 1983); Director, OWCP v. Republic Steel Corp., 663 F.2d 8 (3d Cir. 1981); Director, OWCP v. Brandt Airflex Corp., 645 F.2d 1053 (D.C. Cir. 1981); Director, OWCP v. Todd Shipyards Corp., 625 F.2d 317 (9th Cir. 1980); Director, OWCP v. South East Coal, 598 F.2d 1046 (6th Cir. 1979); Director, OWCP v. Black Diamond Coal Co., 598 F.2d 945 (5th Cir. 1979); Director, OWCP v. Leckie Smokeless Coal Co., 598 F.2d 881 (4th Cir. 1979).

Board concerning the meaning of the LHWCA.[20] By the prevailing view now, where the Secretary is aggrieved by a Board decision, he may appeal it to a court of appeals.[21] But, if the court below was right that the Board is only "part of the Department of Labor's staff" (Appendix A, p. 23a, *infra*), these decisions must be re-examined, and many must be reversed.[22]

Because the question of the Board's relationship to the Secretary presented by this Petition is basic to the LHWCA scheme, its resolution by this Court will not only resolve this particular lawsuit; it will also help guide the courts of appeals, the Board and the Secretary out of the confusion in which they are mired today. In Sections II and III below, we show that, no matter how it is labelled, the Board is a purely adjudicative tribunal that Congress meant to be truly independent of the Secretary and that its members are immune from removal without cause. Answers for the problems sketched above follow logically from that premise.

The constitutional issues presented here also merit review by this Court. For the first time in our history, a

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[20] Boating Indus. Ass'ns v. Marshall, 601 F.2d 1376, 1382 (9th Cir. 1979).

[21] *E.g.*, Director, OWCP v. Cargill, Inc., 689 F.2d 819 (9th Cir. 1982); Direcotr, OWCP v. Newport News Shipbuilding & Dry Dock Co., 676 F.2d 110 (4th Cir. 1982); Shahady v. Atlas Tile & Marble Co., 673 F.2d 479 (D.C. Cir. 1982); Director, OWCP v. Eastern Coal Corp., 561 F.2d 632 (6th Cir. 1977); Director, OWCP v. Alabama By-Products Corp., 560 F.2d 710 (5th Cir. 1977); Director, OWCP v. Peabody Coal Co., 554 F.2d 310 (7th Cir. 1977).

[22] The decisions in *Boating Industries Ass'ns* and *Stockman*, *supra*, would quickly fall by the wayside. The Secretary *could* dictate to his subordinate, the Board, under the LHWCA, and nothing in the statute would give the Board's views on legal issues greater weight than its superior's. Cases upholding the Director's right to appeal decisions of the Board would be equally suspect since (among other things) it is impossible to see how a dispute among subordinates of a single Executive Department could involve sufficient adversity to present a case or controversy cognizable in an Article III court.

Court of Appeals has approved removal from the district courts and delegation to the Executive Branch of the jurisditcion of Article III courts over "private rights" disputes; that is, cases involving "the liability of one individual to another under the law as defined." *Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 102 S.Ct. 2858, 2870-71 (1982) (plurality opinion); *Crowell* v. *Benson*, 285 U.S. 22, 51 (1982). A plurality of this Court recently showed that such disputes, which are the grist for the Board's mill, "lie at the core of the historically recognized judicial power." *Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, *supra*, at 2871. The Court of Appeals has held that these disputes may be adjudicated by subordinates subject to control by the Executive Branch. Appendix A, pp. 38a-47a, *infra*. Section IV.A., below, shows that the separation of powers doctrine precludes this result and that the LHWCA must therefore be construed to confirm the Board's independence. In Section IV.B., we show that the court below construed the Act to create a due process nightmare in which judicial officers are impermissibly subjected to control by the Secretary, a party who regularly appears before them through his delegate, the Director.[23]

Finally, in Section V, below, we ask the Court to consider whether Congress has vested the judicial power of the United States in the Board, thereby entitling its members to the tenure protection of Article III of the Constitution.

II. The Decision Below Conflicts With Applicable Decisions of This Court In Wiener and Humphrey's Executor.

The first mistake the Court of Appeals made was to apply to the Board the "general and long-standing rule . . . that, in the face of statutory silence, the power of

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[23] The Court of Appeals' result has generated litigation in three federal district courts in which parties in proceedings before the Board have challenged, on due process grounds, the Secretary's power to remove Board members without cause. *See* p. 25, *infra*.

removal presumptively is incident to the power of appointment." Appendix A, p. 22, *infra*. It relied on a line of authority in this Court that reached its high-water mark in *Myers* v. *United States*, 272 U.S. 52 (1926).[24] There, Chief Justice Taft, himself a former President, wrote at length in defense of an inherent Presidential removal power as a necessary incident to the President's obligation to take care that the laws be faithfully executed. U.S. Const., Art. II, § 3; *e.g.*, *Myers* v. *United States*, *supra*, 272 U.S. at 119, 132, 135. The President's inherent power to remove his appointees, Chief Justice Taft said in dicta, reached even to officers with duties of "a quasi-judicial character" the discharge of which the Executive could not influence in a particular case. *Id.* at 135.

We will show in Section III below that there is enough on the face of the LHWCA by itself to overcome any "presumption" that might otherwise rest on statutory silence by reason of *Myers* and other cases in its line. But the first thing to say about this authority is that *Myers* no longer applies to judicial officers. On two separate occasions, this Court has confined it to "purely executive officers," has refused to apply it to adjudicatory bodies and has *expressly* disapproved the dicta quoted above. *Wiener* v. *United States*, 357 U.S. 349 (1958); *Humphrey's Executor* v. *United States*, 295 U.S. 609, 627-28 (1935). Thus, in *Humphrey's Executor*, the Court said: "the necessary reach of the *Myers* decision goes far enough to include all *purely* executive officers. *It goes no further* . . . ." 295 U.S. at 627-28 (emphasis added).[25] And, in *Wiener*, the Court noted

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[24] *See also* Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961); De Castro v. Board of Commissioners of San Juan, 322 U.S. 451, 462 (1944); Shurtleff v. United States, 189 U.S. 311 (1903); Reagan v. United States, 182 U.S. 419 (1901); *In re Hennen*, 38 U.S. (13 Pet.) 230 (1839).

[25] The Court accordingly held that a member of the Federal Trade Commission, which performed legislative and judicial func-

that in *Humphrey's Executor* it had "narrowly confined the scope of the *Myers* decision to include *only* 'all *purely* executive officers'" (357 U.S. at 352 (emphasis added)) and had disapproved its dicta regarding the President's power to remove members of quasi-judicial bodies. *Id.* The Court held:

> "Judging the matter in all the nakedness in which it is presented, namely, the claim that the President could remove a member of an adjudicatory body like the War Claims Commission merely because he wanted his own appointees on such a Commission, we are compelled to conclude that *no such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it.*" 357 U.S. at 356 (emphasis added).

Wiener also established that the "most reliable" touchstone for determining the nature of a tribunal "is the nature of the *function* that Congress vested in [it] . . . . What were the *duties* Congress confided to [it] . . . .?" 357 U.S. at 353 (emphasis added).[26] Where, as here, a tribunal's mandate has an "intrinsic judicial character," and its functions require independence, no power of removal of its members is conferred on the executive simply by reason of statutory silence. *Id.* at 353, 355, 356. Adjudication of claims on their merits, of course, is just such a mandate. *See id.* at 355.

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tions, was beyond the reach of any inherent removal power of the President. *Id.* at 629-30. *See also id.* at 626 (disapproving contrary dicta in *Myers*).

[26] Even as early as *In re Hennen*, 38 U.S. (13 Pet.) 230, 260 (1839), this Court had indicated that the rule that the power of removal is incident to the power of appointment does not apply where "a different tenure is . . . implied by the nature of the office . . . ."

Reagan v. United States, 182 U.S. 419 (1901) did apply the *Hennen-Myers* rule to a commissioner in the Indian Territory but, contrary to the view of the Court of Appeals (Appendix A, p. 36a n.83, *infra*) does not survive *Wiener* and *Humphrey's Executor*.

The sole function of the Board is to "hear and determine appeals," based solely on the hearing record. 33 U.S.C. § 921(b)(3) (1976). The function is exactly the one that district courts performed in the pre-1972 scheme (Appendix A, p. 7a, *infra*), and district courts may only exercise judicial power. *Federal Radio Comm'n* v. *General Elec. Co.*, 281 U.S. 464 (1930). Thus, the Board is a "*purely* adjudicative entity . . . ." *Shahady* v. *Atlas Tile & Marble Co.*, 673 F.2d 479, 484-85 (D.C. Cir. 1982) (emphasis added); *see, e.g., Oil, Chem. & Atomic Workers Int'l Union* v. *OSHRC*, 671 F.2d 643, 652 n.12 (D.C. Cir.), *cert. denied*, 103 S.Ct. 206 (1982); *Krolick Contracting Corp.* v. *Benefits Review Bd.*, 558 F.2d 685, 689 (3d Cir. 1977). Even the Court of Appeals acknowledged the "quasi-judicial" character of the Board's function. Appendix A, p. 31a, n.70, *infra*. *See also* 20 C.F.R. §§ 801.103, 801.104 (1982).

The Court of Appeals attempted to distinguish *Humphrey's Executor* and *Wiener* on the grounds that the agencies in these cases "were structurally very different from the Board, and it was these structural differences that prompted the Court to limit the Executive's removal power." Appendix A, p. 33a, *infra*. The court concluded that, in those cases, agency members had been given fixed terms and the agencies placed outside the Executive Branch. *Id.* But, these differences did not prompt the holding in *Wiener*. Although the Court noted the structural characteristics of the War Claims Commission, those characteristics simply did not relate to the question the Court made central to its holding; namely, "[w]hat were the duties Congress confided" to the agency? [27]

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[27] Leading scholars have the same understanding of *Wiener* that we do. *See* K. Davis, Administrative Law of the Seventies, § 1.09-1, at 15-16 (1976). *See also* S. Breyer & R. Stewart, Administrative Law and Regulatory Policy 93, 94-95 (1979).

In sum, the Court of Appeals applied exactly the wrong rule when it inferred from statutory silence on removal that the Secretary has the power to remove the judicial officers of the Board without cause. As *Wiener* established, "no such power . . . is impliedly conferred upon [the Executive] . . . simply because Congress said nothing about it." 357 U.S. at 356.

III. The Decision Below Conflicts With The LHWCA And Decisions Of Other Circuit Courts Construing That Statute.

The court below did not rest its holding solely on its misunderstanding of *Wiener* and *Humphrey's Executor*. *See* Appendix A, p. 38a, n.86, *infra*. Harking to the "sounds of [congressional] silence," it thought it had uncovered "suggestions" in the legislative history of the 1972 amendments and their subsequent administration by the Department that Congress affirmatively intended that Board members serve at the discretion of the Secretary. *Id.* at p. 23a, *infra; see id.* at pp. 23a-30a, *infra*. It bolstered these suggestions by resort to the "legislative history" of a bill introduced—but not enacted—in 1981, nine years after the fact.

The court swept by the face of the LHWCA itself and several cases construing the Act. The statute created the Board and assigned directly to it—not to the Secretary—the judicial duty to "hear and determine appeals" in LHWCA cases. 33 U.S.C. §§ 921(b)(1), (3) (1976). The statute gave the Board power to deny requests by the Secretary (or any other party) to remand a case to an administrative law judge. *See* 33 U.S.C. § 921(b)(4) (1976 and Supp. IV 1980). It made the Board's decisions appealable to the courts of appeals, *not* to the Secretary. *See* 33 U.S.C. § 921(c) (1976). The statute permits the Secretary (through his delegate, the Director) to participate at each stage of LHWCA proceedings, including those before the Board. *See Shahady*

v. *Atlas Tile & Marble Co.*, 673 F.2d 479 (D.C. Cir. 1982). But, it *denied* to the Secretary power to review the Board's decisions himself or otherwise to dictate to the Board concerning the meaning of the LHWCA. *Boating Indus. Ass'ns* v. *Marshall*, 601 F.2d 1376, 1382 (9th Cir. 1979). Although the Board is, of course, housed in the Department of Labor, the characteristics outlined above simply do not describe a superior-subordinate relationship. A superior does not have to appear, either in person or through a delegate, before his subordinate like any other litigant or appeal its decisions to an appellate court. He can make those decisions himself in the first instance.

The statute plainly made the Board independent of the Secretary,[28] confiding judicial functions in the former and executive functions in the latter. Congress' very purpose in revamping procedures under the LHWCA in 1972 was to require this separation of "the function of administering the program and sitting in judgment on the hearings," for Congress had found that commingling those functions was undesirable. S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13-14 (1972).

Ignoring the nature of the Board's functions, the Court of Appeals focused instead on the structural fact that Congress had placed the Board within the Department of Labor; it also noted that the LHWCA had generally authorized the Secretary to promulgate regulations to implement all provisions of the 1972 amendments. Appendix A, pp. 23a-24a, *infra; see* 33 U.S.C. § 939 (1976).[29] Our discussion of *Wiener* and of the

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[28] *See* Oil, Chem. & Atomic Workers Int'l Union v. OSHRC, 671 F.2d 643, 652 n.12 (D.C. Cir.), *cert. denied*, 103 S. Ct. 206 (1982); Stockman v. John T. Clark & Son of Boston, Inc., 539 F.2d 264, 269 (1st Cir. 1976), *cert. denied*, 433 U.S. 908 (1977).

[29] The court also fastened on the fact that the House report related to the amendments stated that the committee had given "most careful consideration" to a report by the National Commission

LHWCA shows that the court below should not have accorded any weight to the structural characteristic of the Board's position on a government organization chart. And, the Secretary's general statutory power to issue regulations (which power did not specifically relate to the Board) plainly could not be exercised to defeat a legislative purpose to establish the Board as an independent adjudicatory body. *See Mourning* v. *Family Publications Serv. Inc.*, 411 U.S. 356, 369 (1973); *Director, OWCP* v. *National Mines Corp.*, 554 F.2d 1267, 1275 (4th Cir. 1977).

As for the administrative practice under the LHWCA, the court below isolated a single regulation from a wealth of regulations and from other official statements and practices of the Department that confirm the Board's independence. To be sure, by 20 C.F.R. § 801.201(d) (1982), the Secretary did purport to arrogate to himself discretion to determine Board members' terms. *See* Appendix D, p. 70a, *infra*. But, this regulation is due no deference as the consistent construction of the LHWCA by those charged with its execution, as the Court of Appeals mistakenly thought. Appendix A at p. 26a, *infra*.[30] All other relevant evidence is contrary to Section 201(d).

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on State Workmen's Compensation Laws that had recommended fixed terms and protection from removal for tribunals like the Board. Appendix A, p. 23a, *infra, quoting* H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 4 (1972). The court seemed to find it significant that this recommendation was not adopted, although it is unclear how much weight was given this circumstance. The 151-page report is full of recommendations on many subjects which were not adopted. The mere failure to adopt one of them permits no reasonable inference that the recommendation was deliberately rejected. *See* Director, OWCP v. Boughman, 545 F.2d 210, 215 n.15 (D.C. Cir. 1976).

[30] It was hardly fair of the Court of Appeals to label Section 201(d) a *consistent* construction of the LHWCA. This case is the first occasion on which the regulation has ever been invoked although there have been five Secretaries of Labor in four Presidential administrations since its promulgation.

Thus, simultaneously with promulgation of that rule, the Secretary also issued 20 C.F.R. § 801.104 (1982), which called on the Under Secretary to promulgate

> "such rules and regulations as may be necessary or appropriate for effective operation of the Benefits Review Board as an *independent quasi-judicial body in accordance with the provisions of the statute.*" 38 Fed. Reg. 6171, 6172 (1973) (emphasis added).[31]

The Secretary asserted exactly our view of the LHWCA as a necessary part of his position before the Court of Appeals for the Ninth Circuit in *Boating Indus. Ass'ns* v. *Marshall*, 601 F.2d 1376 (9th Cir. 1979).[32] He said of the Board in his brief that:

> "The Board is statutorily created, and although it too is housed [with administrative law judges] within the Department of Labor, it is not subject to direction or review by the Director, the Assistant Secretary, *or the Secretary*; its nature as *exclusively* an 'independent quasi-judicial' appellate-review tribunal is recognized and respected." Appendix F, p. 77a, *infra* (emphasis added).

The Ninth Circuit based its holding in part on that same premise. 601 F.2d at 1382 (Secretary cannot "dictate to the Benefits Review Board . . . .").

Finally, the court below relied on proposed legislation introduced in 1981 (nine years after the fact), but never enacted, that the court thought showed Congress "might" view the independence of Board members as a change in

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[31] 20 C.F.R. § 801.103 provides:

> "As prescribed by the statute, the functions of the Benefits Review Board are quasi-judicial in nature . . . ."

See also p. 4 n.5, *supra*.

[32] *Boating Industries* involved a pre-enforcement effort to challenge an advisory ruling of the Secretary under the LHWCA. 601 F.2d at 1378-79. The Secretary argued—and the Ninth Circuit held—that his ruling was not ripe for review in such an action because it was not binding on the Department's adjudicative officers. *Id.* at 1382-84.

status. Appendix A, p. 30a, 38a, n.86, *infra*. The court simply should not have relied on this non-enacted bill. *E.g. Consumer Product Safety Comm'n* v. *GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980); *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 170 (1968).[33]

The Court of Appeals' view of the LHWCA scheme makes no sense. Congress had no reason to and would not create an adjudicative tribunal subject to the control of a party that regularly appears before it. Nor would it sandwich an untenured Board between administrative law judges who enjoy statutory protection against summary dismissal and judges of the courts of appeals who enjoy constitutionally guaranteed tenure.[34]

The Court of Appeals thought that "Congress *might* have deemed" a removal power necessary "since the Secretary was to be held accountable for agency operations." Appendix A, p. 26a, *infra* (emphasis added). There is no evidence, however, that the Secretary was to be accountable for the Board's work. To the contrary, Congress created the *Board* to decide cases and did so deliberately in order to separate the judicial and executive functions under the LHWCA. S. Rep. No. 92-1125, 92d Cong., 2d

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[33] The only Congressional source the court below cited on the effect of the 1972 amendments was Senator Nickles (Appendix A, pp. 28a-29a, *infra*), and he was not elected until 1980. The court also referred to testimony of non-Congressional witnesses (*id.* at 29a-30a), but taken as a whole, the material does not support even the court's limited conclusion. Most witnesses—including the Department of Labor—did not comment on the Board's independence under existing law at all. Board Chairman Smith apparently thought Sen. Nickles proposal to make the Board "independent" referred only to structural, not functional, independence. *See id.* at 29a.

[34] We emphasize that it is not our position that the LHWCA protects Petitioners from removal even *with* cause. That is not the issue here. The statute implies that such removal might be permissible by its requirement that Board members be "especially qualified to serve . . . ." 33 U.S.C. § 921(b)(1) (1976). What the Secretary cannot do, under *Wiener* and the LHWCA, is assert the power he claims here since that power destroys the Board's independence.

Sess. 14 (1972). By the same token, the court below did not identify any aspect of the Secretary's duties under the LHWCA that might be furthered by his control of the Board (and in the course of this litigation the Secretary has not done so either).

We turn now to the question whether Congress could constitutionally have set up the bizarre adjudicatory scheme that the Court of Appeals has read into the statute.

IV. This Court Should Settle The Important Constitutional Questions Raised By The Decision Below.

The Court of Appeals approved an adjudicative scheme that raises fundamental constitutional objections under both separation of powers principles and the Due Process Clause. The result below violates the separation of powers doctrine by approving adjudication by the Executive of private rights disputes. The scheme violates the Due Process Clause by delegating to an Executive officer the power to control the composition of a judicial tribunal before which, through his delegate, he regularly appears as a party.

The constitutional problems in the statute as construed would be avoided by holding that the LHWCA did not confer on the Secretary power to remove Board members at will. The Court of Appeals could and should have avoided creating these issues. *E.g.*, *Crowell* v. *Benson*, 285 U.S. 22, 62 (1932); Appendix A, p. 11a, n.27, *infra*.[35]

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[35] The Court of Appeals questioned whether Petitioners had standing to raise these constitutional issues since (1) they cannot themselves be subject to any potential unfairness in adjudication that due process protects against, and (2) holding the LHWCA unconstitutional on separation of powers grounds would involve abolishing the very offices Petitioners are seeking to retain. Appendix A, p. 39a, n.89 and p. 42a, n.91, *infra*. *But see id.* at p. 11a n.27, *infra*. It is not our position that the LHWCA is unconstitutional for either reason but that, as construed by the Court of Appeals, there are serious due process and separation of powers questions as to the constitutionality of the LHWCA, which the Court of Appeals should have avoided.

A. The LHWCA As Construed Violates The Separation Of Powers Doctrine.

As the Court of Appeals construed the LHWCA scheme, the statute invades the exclusive province of Article III courts and, by assigning part of their jurisdiction to subordinates of the Executive, directly violates the separation of powers doctrine. The contrary holding on this point below was both wrong and unprecedented.

The work of the Board is to adjudicate private rights disputes (*i.e.*, claims among private parties), applying the law as defined. In *Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 102 S.Ct. 2858 (1982), the plurality showed that this function lies "at the core of the historically recognized judicial power" reserved to the Judicial Branch by Article III. 102 S.Ct. at 2871 (plurality opinion). *See also Crowell* v. *Benson*, 285 U.S. 22 (1932).[36] Under the Constitution, *Northern Pipeline* made clear, such power may only be exercised by an Article III court or a lawful "adjunct" to such a court, and the permissible use of adjuncts is "in no sense an 'exception' to Article III." 102 S. Ct. at 2874 n.29. The Court of Appeals' holding would create just such an exception, however, since it made the Board an adjunct to the Secretary, an Article II officer, not to the courts. *E.g.*, Appendix A, pp. 3a, 23a, 39a n.88, 45a n.101, *infra*.[37]

Where a tribunal may only lawfully be an adjunct to an Article III court but is in fact subject to Executive

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[36] The Board's admiralty jurisdiction stands on the same footing, for admiralty cases are expressly referred to in Article III, § 2. *See* Appendix D, p. 61a, *infra*.

[37] What all the opinions in *Northern Pipeline* add up to is that private rights disputes must be adjudicated, within the federal system, in an Article I court, an Article III court or an adjunct subject to control by an Article III court. Thus, *Northern Pipeline* does not permit adjudication of such disputes by the Executive or officers subject to coercion by the Executive Branch.

coercion, the separation of powers objection is plain. This Court has said that:

> "each department should be kept completely independent of the others—independent not in the sense that they shall not cooperate but in the sense that *the acts of each shall never be controlled by, or subjected, directly or indirectly, to, the coercive influence of either of the other departments.*" *O'Donoghue* v. *United States*, 289 U.S. 516, 530 (1933) (emphasis added).[38]

Thus, even if Congress had meant to do so—which it did not—delegation of part of the core judicial power to an executive officer would clearly violate separation of powers principles.

The Court of Appeals believed that in *Crowell* v. *Benson*, 285 U.S. 22 (1932), this Court had approved "the initial determination of workers' compensation claims [by] . . . deputy commissioners, *the subordinates of the Act's Executive officers.*" Appendix A, p. 43a, *infra* (emphasis added). It therefore concluded that "*Crowell* . . . is dispositive of this case." *Id.* at p. 44a, *infra*.[39] But, the deputy commissioners involved in *Crowell* were *not* subordinates of the Executive Branch, as the Court of Appeals has held the Board to be. They were deputy commissioners of the U.S. Employees Compensation Commission, an independent agency and were, as Justice White said, an "Article I adjudication mechanism." *Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, *supra*, 102

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[38] More recently, in United States v. Raddatz, 447 U.S. 682 (1980), an effective majority of the Court upheld the use of magistrates to make recommendations on pretrial suppression motions in criminal cases but emphasized the control over the magistrate of an Article III district judge. *Id.* at 681 (plurality opinion), 685-86 (concurring opinion).

[39] Actually, *Crowell*, did not explicitly involve any separation of powers issue, although it did approve use of adjuncts under the supervision of Article III courts to perform limited fact-finding functions.

S.Ct. at 2891 (White, J., dissenting); *see* 39 Stat. 748 (1916); *Crowell* v. *Benson*, *supra*, 285 U.S. at 42 n.7. This distinction between this case and *Crowell* is crucial. A basic purpose of the separation of powers doctrine is to prevent a concentration of power in any of the three branches of government. The holding in *Crowell* that some adjudicatory functions may be assigned to an agency independent of the Executive Branch does not defeat this purpose. The holding below plainly does.

The Court of Appeals also tried to liken the Board to "scores of administrative boards and tribunals in the Executive Branch that currently adjudicate claims to federal statutory rights." Appendix A, p. 44a, *infra*. By this loose generalization, however, the court sought to obliterate the distinction between matters of *public* right, which may be withdrawn from the Judicial Branch, and matters of private rights, which may not. *Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, *supra*, 102 S.Ct. at 2870-71 (plurality opinion). None of the executive tribunals administering "federal statutory rights" that the Court of Appeals identified (Appendix A, pp. 44a-45a nn. 98-100, *infra*) adjudicates private rights or acts as an adjunct to any Article III court, and the Secretary has failed throughout this case to identify any executive tribunal that does.[40]

B. The LHWCA As Construed Violates The Due Process Clause.

The result reached by the Court of Appeals cannot be squared with the requirements of due process. A "fair trial in a fair tribunal is a basic requirement of due process,"[41] one that "entitles a person to an impartial

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[40] For this reason, there was no basis for the court's obvious concern that to recognize the separation of powers issue here "would unnecessarily call into constitutional question" the validity of other quasi-judicial boards. *See* Appendix A, p. 47a, *infra*.

[41] Withrow v. Larkin, 421 U.S. 35, 46 (1975); *In re* Murchison, 349 U.S. 133, 136 (1955).

and disinterested tribunal in both civil and criminal cases" [42] and in administrative proceedings as well.[43]

In *Tumey* v. *Ohio*, 273 U.S. 510 (1927), the Court established the rule that due process is denied where there is "a possible temptation to the average man as judge . . . which might lead him not to hold the balance nice, clear and true" between the litigants before him. *Id.* at 532; *see, e.g., Connally* v. *Georgia*, 429 U.S. 245, 249 (1977); *Ward* v. *Village of Monroeville*, 409 U.S. 57, 60 (1972); *In re Murchison*, 349 U.S. 133, 139 (1955). That "*possible* temptation" need not involve a direct stake in the determination of a particular lawsuit or other judicial act. *See Ward* v. *Village of Monroeville, supra*; *id.* at 62 (White, J., dissenting). Nor must a petitioner necessarily show "special prejudice in his particular case." *Id.* at 61. Thus, the Court of Appeals for the Ninth Circuit has recently held that it violates the due process rights of parties to require them to submit their claims to a tribunal that consists of representatives of litigants who regularly appear before the tribunal. *United Farm Workers of America, AFL-CIO* v. *Arizona Agricultural Employment Relations Bd.*, 696 F.2d 1216, 1222 (9th Cir. 1983).[44]

The litigation scheme here directly violates these ground rules. Consistently with the LHWCA, the Secretary has from the outset participated through his delegate, the Director, at every stage of proceedings under the statute, including those before the Board. The Director is a vigorous advocate of his positions, whether they involve simply his views of the meaning of the Act or issues related to the liability of a fund he administers.

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[42] Marshall v. Jerrico, 446 U.S. 238, 242 (1980).

[43] Withrow v. Larkin, 421 U.S. 35, 46-47 (1975). *See also* Gibson v. Berryhill, 411 U.S. 564, 579 (1973); Hannah v. Larche, 363 U.S. 420, 442 (1960); Amos Treat & Co. v. SEC, 306 F.2d 260 (D.C. Cir. 1962).

[44] A decision based on animosity, favoritism, or personal interest violates due process whether it involves a question of fact or a question of law. 696 F.2d at 1220-21.

See p. 5 n.6, *supra*. The due process principles outlined above do not allow a litigant to control the jobs of judges before whom he regularly appears. Of course, the average man as judge may be tempted to tip the balance in favor of his superior, or his superior's delegate, and will not—or will not appear to—dispense impartial and disinterested justice. *See Humphrey's Executor* v. *United States*, *supra*, 295 U.S. at 629.

In the wake of the Court of Appeals' decision, litigants before the Board have filed actions in district courts in Connecticut, Texas and California, challenging, on due process grounds, the Secretary's power to remove Board members at will.[45] To avoid serious due process objections to the LHWCA, the statute must be construed to confirm the Board's independence.

V. Judges of the Benefits Review Board Enjoy The Tenure Protection of Article III.

The Court of Appeals held that the Benefits Review Board is not a court that exercises "the judicial power of the United States" and that its members therefore do not enjoy the tenure protection guaranteed to federal judges by Article III of the Constitution. *See* Appendix A, pp. 10a-21a, *infra*. It agreed that for purposes of determining whether a tribunal enjoys Article III status, "it is not what Congress *says* but what powers Congress vests in the adjudicatory body that counts." Appendix A, pp. 13a-14a, *infra*, *citing Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, 102 S.Ct. 2858 (1982). It thus accepted what all the opinions in *Northern Pipeline* make clear: whether or not Congress expressly intends to create an Article III court, it is for this Court to determine whether an adjudicatory body has been vested with the judicial power of the United States such that its members are entitled to the protections of Article III.

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[45] Hudson v. Donovan, No. G-83-31, S.D. Texas, Galveston Div'n; Church v. Donovan, Civil No. H-83-70, D. Conn.; Silliman v. Donovan, No. C-830991RPA, N.D. Cal. These cases are pending in their respective courts.

The issue is one of substance, not form. We submit that Congress created in the Board a federal court of limited jurisdiction, which exercises part of the judicial power of the United States. The Court of Appeals conceded that the Board's jurisdiction was over matters of "private rights." Appendix A, pp. 15a-16a, *infra*. *See Northern Pipeline Const. Co.* v. *Marathon Pipe Line Co.*, *supra*, 102 S.Ct. at 2871. The Board's charter under the LHWCA also involves "Cases of admiralty and maritime Jurisdiction." U.S. Const. Art. III, § 2. This Court early held that "judicial power" in admiralty matters can only be exercised by Article III judges. *American Ins. Co.* v. *Canter*, 26 U.S. (1 Pet.) 511 (1828).

Although compensation claims themselves involve federal statutory rights,[46] the Board's jurisdiction extends to every "question in respect to a compensation claim"; that is, every question "derived from the same nucleus of operative facts" as the claim. *Aetna Life Ins. Co.* v. *Harris*, 578 F.2d 52, 54 (3d Cir. 1978); *see* 33 U.S.C. §§ 919(a), (d) (1976 and Supp. IV 1980). This jurisdiction thus extends to claims not created by Congress and embraces questions of state law that this Court has held may only be decided in the federal system by Article III judges.[47]

As the Court of Appeals determined, the Board's function is "identical to that which the District Court performed prior to the 1972 amendments," Appendix A, p. 7a, *infra* (footnote omitted), and as we noted above (p.

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[46] *See* Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 102 S.Ct. 2858, 3875-77 (1982) (plurality opinion); Appendix A, p. 19a, *infra*.

[47] Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 102 S. Ct. 2858 (1982). *See* Ryan-Walsh Stevedoring Co. v. Trainer, 601 F.2d 1306 (5th Cir. 1979); Aetna Life Ins. Co. v. Harris, 578 F.2d 52 (3d Cir. 1978); Smith v. Sealand Terminal, Inc., 14 Ben. Rev. Bd. Serv. 844 (1982); McCluskey v. Zeigler Coal Co., 2 Black Lung Rep. 1-1248, 1-1251 (Ben. Rev. Bd. 1981). *See also* Lockerty v. Phillips, 319 U.S. 182, 189 (1943).

14, *supra*), district courts may only exercise judicial power. Congress, of course, was well aware that it was assigning to the Board the same appellate jurisdiction in LHWCA cases that District Courts had formerly exercised. S. Rep. No. 1125, 92d Cong., 2d Sess. 14 (1972).

The fact that the Board's subject matter jurisdiction is limited has no significance. In *Glidden Co.* v. *Zdanok*, 370 U.S. 530 (1962), this Court upheld the Article III status of the Court of Customs and Patent Appeals and the Court of Claims. "Congress," the plurality explained, "has never been compelled to vest the *entire* jurisdiction provided for in Article III upon inferior courts of its creation . . . ." *Id.* at 561 (emphasis added). Article III's requirements apply wherever "laws of national applicability and affairs of national concern are at stake." *Palmore* v. *United States*, 411 U.S. 389, 407-08 (1973).[48] The Board's jurisdiction involves just such laws and just such affairs.[49]

The Court of Appeals did not dispute that the Board exercised some judicial power within the meaning of Article III. Instead, it thought the test was "whether an adjudicatory body has *enough* characteristics of an Article III court" (Appendix A, p. 19a, *infra*) (emphasis added), and concluded the Board did not pass this test. *Id.* at pp. 20a-21a. The court shed no light on the question how many characteristics would be "enough."[50] The

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[48] Language in *Palmore* that suggested a different rule would apply "to specialized areas having particularized needs and warranting distinctive treatment" (411 U.S. at 408) refers only to geographic areas. Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 102 S.Ct. 2858, 2874 (1982) (plurality opinion).

[49] In fact, the Board exercises international jurisdiction under, for example, the Defense Base Act, 42 U.S.C. § 1651 *et seq.*

[50] Although the plurality in *Northern Pipeline* did find that the bankruptcy courts posssesed "all 'essential attributes' of the judicial power of the United States," it did not say that nothing short of that would qualify a tribunal as an Article III court. *See* 102 S.Ct. at 2878-79.

attributes it found absent from the Board—for example, that it need not follow the *Federal Rules of Evidence*—may say something about a trial court, but they say little or nothing about this appellate body.[51] The only attribute required by Article III itself is that an adjudicatory body exercise the "judicial Power of the United States." The Benefits Review Board possesses that attribute.

Because the Board exercises Article III power, its members are entitled to Article III protection[52] unless Congress clearly intended to deny it (in which case the LHWCA would be unconstitutional).[53] As the Court of Appeals itself suggested,[54] the LHWCA contains no unambiguous evidence of such an intent.[55]

We submit that the question whether members of the Board, which adjudicates private rights disputes, enjoy the tenure protection of Article III is a question of law that this Court should review on certiorari.

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[51] The court referred to the fact that the Board lacks power to enforce its orders. The Court of Claims lacked this power also but was still held to be an Article III court. *See* Glidden Co. v. Zdanok, 370 U.S. 530, 568-69 (1962) (plurality opinion).

[52] Congress' failure to provide such protection expressly is not decisive, as the Court of Appeals recognized. Appendix A, pp. 13a-14a, *infra*. *See also id.* at 11a-12a n.27; *Ex parte* Bakelite Corp., 279 U.S. 438, 459 (1929).

[53] *See* Northern Pipeline Const. Co. v. Marathon Pipe Line Co., 102 S.Ct. 2858 (1982).

[54] The court below apparently believed that it might find "an implied grant of life tenure" in the LHWCA if necessary to uphold its constitutionality under Article III. Appendix A, p. 12a n.27, *infra*.

[55] Nothing in the Constitution requires that judges of inferior federal courts be appointed by the President; Presidential appointment is only required for Justices of this Court. *See* U.S. Const., Art. II, § 2.

CONCLUSION

The Court of Appeals has exposed the Board, for the first time since its establishment, to the winds of political change. Congress did not intend this result, and the Constitution does not permit it. We respectfully suggest that the Court should issue the writ of certiorari we request and set this case for plenary consideration on the merits.

Respectfully submitted,

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April 1983

APPENDICES

APPENDIX A

Opinion of the United States Court of Appeals for the District of Columbia Circuit

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 82-1631

ISMENE M. KALARIS, Administrative Appeals Judge

v.

RAYMOND J. DONOVAN, Secretary of Labor, *et al.*,
Appellants

No. 82-1633

JULIUS MILLER, Administrative Appeals Judge

v.

RAYMOND J. DONOVAN, Secretary of Labor, *et al.*,
Appellants

No. 82-1707

ISMENE M. KALARIS, Administrative Appeals Judge,
Appellant

v.

RAYMOND J. DONOVAN, Secretary of Labor, *et al.*

No. 82-1694

JULIUS MILLER, Administrative Law Judge,
Appellant

v.

RAYMOND J. DONOVAN, Secretary of Labor, *et al.*

Appeals and Cross-Appeals from the
United States District Court
for the District of Columbia
(D.C. Civil Actions Nos. 82-01278 & 82-01406)

Argued November 16, 1982

Decided January 4, 1983

Richard K. Willard, Deputy Assistant Attorney General, with whom *Stanley S. Harris*, United States Attorney, and *Robert E. Kopp* and *Alfred R. Mollin*, Attorneys, Department of Justice, were on the brief, for Secretary of Labor Donovan, *et al.*, appellants in Nos. 82-1631 and 82-1633 and cross-appellees in Nos. 82-1707 and 82-1694. *Anthony J. Steinmeyer*, Attorney, Department of Justice, entered an appearance for Secretary Donovan, *et al.*

Theodore Voorhees, Jr., with whom *William H. Allen* and *Douglas S. Abel* were on the brief, for Kalaris and Miller, appellees in Nos. 82-1631 and 82-1633 and cross-appellants in Nos. 82-1707 and 82-1694.

Thomas C. Fitzhugh, III and *Stephen M. Vaughan* filed a *pro se* brief as *amici curiae* in support of appellees/cross-appellants Kalaris and Miller.

Mark Schaffer was on the brief for *amicus curiae* Maritime Claimant's Attorneys Association in support of appellees/cross-appellants Kalaris and Miller.

Before WRIGHT, TAMM, and WALD, *Circuit Judges.*

Opinion for the court filed by *Circuit Judge* WRIGHT.

WRIGHT, *Circuit Judge*: The Department of Labor's Benefits Review Board hears appeals from decisions of Administrative Law Judges (ALJs) concerning claims for federal workers' compensation brought pursuant to the Longshoremen's and Harbor Workers' Compensation Act of 1927, 44 STAT. 1424, *as amended*, 33 U.S.C. § 901 *et seq.* (1976 & Supp. IV 1980). The Act expressly authorizes the Secretary of Labor to appoint the three members of the Board, 33 U.S.C. § 921(b)(1) (1976), but is silent concerning the members' tenure and the terms of their removal. Contemporaneously with creation of the Board, the Secretary promulgated regulations providing that Board members would serve indefinite terms at his discretion. 20 C.F.R. § 801.201(d) (1982). This regulation remained unchallenged for almost a decade.

In May of 1982 the Secretary attempted to remove two members of the Board without specifying his reasons or providing them with a hearing.[1] The removed members brought suit in the District Court to enjoin the Secretary from removing them. The District Court awarded the requested injunctions. Although it found that the Board was not an Article III court and therefore that the Board members were not entitled to Article III's guarantee of life tenure, the District Court held that Board members could not be removed without a showing of cause because Congress intended for the Board to have an independent and quasi-judicial status. We agree that the Board is not an Article III court. But because we find that Congress did not intend to make the Board independent of the Secretary, we reverse the District Court's judgment enjoining the Board members' removal. We hold to the long-standing rule that in the face of congressional

[1] The removed Board members are Ismene M. Kalaris and Julius Miller. They are appellees in Nos. 82-1631 and 82-1633, and cross-appellants in Nos. 82-1707 and 82-1694.

silence all inferior officers of the United States serve at the discretion of their appointing officer.

I. BACKGROUND

The Longshoremen's and Harbor Workers' Compensation Act provides workers' compensation for certain workers not covered by state workers' compensation schemes.[2] The Act makes employers liable up to a statutory maximum for job-related injuries and deaths without regard to fault. 33 U.S.C. § 904 (1976). If a dispute regarding a claim arises, a deputy commissioner of the Department of Labor will seek to resolve it through informal means.[3] 20 C.F.R. § 701.311-701.319 (1982). If informal resolution is not possible, the deputy commissioner will transfer the dispute to an ALJ. 33 U.S.C. § 919(d) (1976 & Supp. IV 1980). The ALJ will conduct a formal hearing according to the Administrative Procedure Act, 5 U.S.C. §§ 500-576 (1976 & Supp. V 1981),[4] and has the power to approve settlements of disability,[5] to approve withdrawal of claims,[6] and to issue compensation

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[2] For a description of the modern version of the federal workers' compensation system, *see generally* Doak & Hecker, *Is it a New Ball Game?—The 1972 Amendments to the Longshoremen's and Harbor Workers' Act*, 11 FORUM 544 (1976); Gorman, *The Longshoremen's Act After the 1972 Amendments*, PRAC. LAW., May 1974, at 13; Hazen & Toriello, *Longshoremen's Personal Injury Actions Under the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act*, 53 ST. JOHNS L. REV. 1 (1978).

[3] Deputy commissioners are regional officials charged with the day-to-day administration of the Act. 33 U.S.C. §§ 939, 940 (1976); 20 C.F.R. §§ 701.201-701.203 (1982).

[4] 33 U.S.C. § 919(d) (1976 & Supp. IV 1980).

[5] *Clefstad v. Perini N. River Ass'n*, 9 Benefits Review Board Service (BRBS) 217 (1978).

[6] *Graham & Ingalls Shipbuilding/Litton Systems, Inc. v. Director, OWCP*, 9 BRBS 155 (1978). Approval of a withdrawal claim will be made if it is "for a proper purpose and in the claimant's best interest." 20 C.F.R. § 702.216 (1982).

orders.[7] Interested parties may file appeals from the ALJ's decision with the Board,[8] and from the Board with the appropriate Court of Appeals.[9] 33 U.S.C. §§ 921(b) & (c) (1976 & Supp. IV 1980).

Prior to the Act's amendment in 1972, deputy commissioners adjudicated disputed claims—conducting hearings and receiving evidence, 44 STAT. 1435, as well as administering the Act. Their initial decisions were then reviewable by the District Courts, with further resort, if desired, to the Courts of Appeals.[10] The 1972 amendments

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[7] 20 C.F.R. § 702.348 (1982).

[8] Interested parties normally include the employer and the claimant. But the Director of the Office of Workers' Compensation Programs (OWCP) is, by regulation, also a party in interest and may participate in any formal hearing. 20 C.F.R. § 802.410(b) (1982). The Director is thereby entitled to seek review of Board decisions in the courts, *see Director, OWCP v. Boughman*, 545 F.2d 210 (D.C. Cir. 1976); *see also Director, OWCP v. Eastern Coal Corp.*, 561 F.2d 632, 641-649 (6th Cir. 1977), to "ensure proper and consistent administration of the Act," *Shahady v. Atlas Tile & Marble Co.*, 673 F.2d 479, 483 (D.C. Cir. 1982) (*per curiam*), and to administer the special fund created for the relief of injured workers whose employers have defaulted on compensation payments or become insolvent. *See, e.g., Erickson v. Crowley Maritime Corp.*, 14 BRBS 218 (1981).

[9] The Board can be a party to an appeal from one of its own decisions, *see* 20 C.F.R. § 801.402 (1982), but it does not *have* to be. *McCord v. Benefits Review Board*, 514 F.2d 198 (D.C. Cir. 1975). The Board does not have to be a party to the appeal because the employer and the employee are sufficiently adverse parties, because the Court of Appeals has the plenary power necessary to do justice, and because the statute does not require the Board to be a party to court proceedings. *Id.*; *see also Oil, Chemical & Atomic Wkrs Int'l Union v. OSHRC*, 671 F.2d 643, 652 n.12 (D.C. Cir. 1982) (*per curiam*).

[10] The District Courts would review the deputy commissioners' decisions to see if the findings of fact were supported by "substantial evidence" and to determine, *de novo*, if the

completely overhauled the procedures necessary to obtain benefits under the Act.[11] The amendments left the initial informal resolution of claims to the deputy commissioners,[12] but transferred the formal adjudication of claims to the ALJs and the Board.[13] The amendments thus completely eliminated the role of the District Courts in the claims process, though, of course, resort to the Courts of Appeals was maintained.

Under the new procedural scheme, the ALJs make formal findings of fact and draw conclusions of law.[14] The Board, acting as a "quasi-judicial" internal appellate

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conclusions of law were "in accordance with law." 44 STAT. 1436; *see also O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951).

[11] 86 STAT. 1261. For a thorough review of the revised claims procedures under the 1972 amendments, *see* Tucker, *Coverage and Procedure Under the Longshoremen's and Harbor Workers' Compensation Act Subsequent to the 1972 Amendments*, 55 TUL. L. REV. 1056, 1082-1088 (1981).

[12] *See* note 3 *supra* and accompanying text.

[13] The Senate Report to the 1972 amendments complained that the old Act had "suffered by virtue of the failure to keep separate the functions of administering the program and sitting in judgment on the hearings." S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13-14 (1972). Congress therefore reorganized the deputy commissioners' duties, dividing them among the deputy commissioners, the ALJs, and the Board.

In addition to claims under this Act, the Board hears appeals arising from other federal workers' compensation statutes. *See, e.g.*, Federal Mine Safety and Health Act of 1972, 30 U.S.C. § 932 (1976 & Supp. IV 1980); Defense Base Act, 42 U.S.C. § 1651 *et seq.* (1976 & Supp. IV 1980); District of Columbia Workers' Compensation Act, 36 D.C. Code § 501 *et seq.* (1981); Outer Continental Oil Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* (1976 & Supp. IV 1980); Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171 *et seq.* (1976 & Supp. V 1981).

[14] 33 U.S.C. § 919(d) (1976 & Supp. IV 1980).

review mechanism,[15] then considers the record developed before the ALJs and determines if their decisions are supported by substantial evidence and are in accordance with law.[16] 33 U.S.C. § 921(b)(3) (1976); *see* 20 C.F.R. § 802.301 (1982). The Board thus performs a review function identical to that which the District Courts performed prior to the 1972 amendments.[17] The claims decisions, once considered by the Board, can be reviewed again by the Courts of Appeals, on petition, to determine if they are supported by substantial evidence and if they are in accordance with law.[18] 33 U.S.C. § 921(c) (1976).

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[15] The Department of Labor's own regulations provide that "[a]s prescribed by statute, the functions of the Benefits Review Board are quasi-judicial in nature * * *." 20 C.F.R. § 801.103 (1982). But the statute also placed the Board *within* the Department of Labor, and left to the Secretary the task of adequately separating the administrative and adjudicative functions. 33 U.S.C. § 939 (1976). Pursuant to this statutory duty, the Secretary placed the Board within the Office of the Under Secretary of Labor. The Secretary authorized the Under Secretary to promulgate rules and regulations "appropriate for effective operation of the Benefits Review Board as an independent quasi-judicial body in accordance with the provisions of the statute," 20 C.F.R. § 801.104 (1982), and to provide the Board with funds, supplies, and equipment, *id.* The Secretary also authorized the Solicitor of Labor to appoint attorneys to represent the Board in court. *Id.*

[16] The Board will not hear issues which were not raised before the ALJ and which were not specified in the petition. *Moore v. Paycor, Inc.*, 11 BRBS 483, 492-493 (1979). Nor can the Board hear new evidence. 20 C.F.R. § 802.301 (1982).

[17] *See, e.g., Nacirema Operating Co. v. Benefits Review Board*, 538 F.2d 73, 75 (3d Cir. 1976). It is important to understand, however, that the District Courts, like the Board now, did not perform a *de novo* factual review, did not consider new evidence, and did not reweigh the evidence. *See* note 10 *supra*.

[18] The appellate courts' function did not change when the initial review function was shifted from the District Courts

See Nat'l Steel & Shipbuilding Co. v. Bonner, 600 F.2d 1288, 1292 (9th Cir. 1979); *Presley v. Tinsley Maintenance Serv.*, 529 F.2d 433, 436 (5th Cir. 1976). Thus the Board screens cases, administers Department policy, and apparently reduces the number of cases that will be taken to the Courts of Appeals; its review function, a replacement for the District Court's review, is duplicated in those cases that actually do advance to the Courts of Appeals.[19]

The Board's members are appointed by the Secretary under the specific mandate of the Act. 33 U.S.C. § 921 (b) (1) (1976).[20] Julius Miller was appointed to the Board in 1974, and Ismene Kalaris was appointed in 1978. They served on the Board until April 30, 1982, when the Under Secretary of Labor informed them that they were to be removed from their positions on the Board, effective May 31, 1982. No reasons were given for the removals.[21] No member of the Board had ever previously been involuntarily removed from office.[22]

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to the Board. *See Duluth, Missabe & Iron Range R. Co. v. Dep't of Labor*, 553 F.2d 1144, 1147 (8th Cir. 1977). In other words, the standards for review of questions of fact and law remained the same.

[19] The Board must enlist the aid of the District Courts, however, to enforce its orders. 33 U.S.C. § 921(d) (1976).

[20] Board members are inferior officers of the United States. *See* U.S. Const. Art. II, § 2. For the text of 33 U.S.C. § 921(b) (1), *see* note 51 *infra*.

[21] The record does contain several possible explanations, however. The Under Secretary allegedly indicated some concern with the Board's "volume of work." Joint Appendix (JA) 46. But the record does not indicate what the exact concern involved. *Cf.* JA 103 (Board's production exceeding targeted levels). The removed members also claimed that the new Chief Judge made their removal a condition of his acceptance of the chief judgeship. JA 49-51. Finally, there is some indication that the Secretary simply wanted to replace these members with appointees of his own. JA 123-124. None of these explanations was substantiated.

[22] Brief for appellees/cross-appellants at 8-9.

In May 1982 Miller and Kalaris brought these actions for declaratory and injunctive relief.[23] They argued that the Board was an Article III court and that they, as judges on an Article III court, were entitled to life tenure and could not be removed during good behavior. Alternatively the complaint asserted that Congress intended in the Act to create a Board which was independent of the Secretary and whose members could therefore not be removed absent a showing of "cause."

The District Court rejected the removed members' claim that the Board was an Article III court and that they were thus entitled to life tenure. JA 144-145. But to avoid casting the constitutionality of the statute into doubt, it accepted the Board members' argument that Congress, despite its silence, meant to require the Secretary to show "cause" before removing a member from this "independent and quasi-judicial" tribunal. JA 143-144. The District Court concluded that 33 U.S.C. § 921(b) (1976), the provision authorizing the Secretary to appoint Board members, would be unconstitutional if it were construed to permit the Secretary "to influence claims decisions * * * through replacement of the entire Board." JA 142. Citing numerous admonishments in two Supreme Court decisions, *Humphrey's Executor v. United States*, 294 U.S. 602 (1935), and *Weiner v. United States*, 359 U.S. 349 (1958),[24] the District Court found that the

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[23] The removed members protest their unexplained removals. They were, however, only transferred to other positions in the Department of Labor, at like grade and pay. Brief for appellants/cross-appellees at 26 n.25.

[24] JA 142-144. For example, the District Court stated:

> Congress certainly did not intend to permit the Secretary to pack this independent and quasi-judicial tribunal, "for it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will. * * *

[continued]

statute barred the Secretary from removing the Board members from their positions without showing cause and providing an opportunity for hearing.[25] JA 145-146. Consequently, the District Court granted the removed members' motion for summary judgment and enjoined their removal from the Board. The Secretary appeals this decision, and the removed members cross-appeal the District Court's denial of the Board's Article III status.

II. The Board's Article III Status

Article III, Section 1 of the federal Constitution provides:

> The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges both of the supreme and inferior Courts, shall hold their Offices during good Behaviour, and shall, at stated Times, receive for

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JA 143 (*quoting Humphrey's Executor v. United States*, 295 U.S. 602, 629 (1935)). The District Court believed that the

> nature of the Board's duties requires independence from the Secretary. The Board is analogous to the positions of Federal Trade Commissioner in *Humphrey's Executor v. United States, supra*, and War Claims Commissioner in *Weiner v. United States, supra*. * * *

JA 144.

[25] Because the District Court found that Congress intended the Board to be independent of the Secretary, it did not decide whether Congress constitutionally could have assigned these functions to the Secretary himself. JA 144. It merely held that the statute gave Board members a "property" interest in their positions and a constitutional entitlement to notice and hearing. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Perry v. Sinderman*, 408 U.S. 593, 601 (1972). This protection was constitutionally required because Congress had chosen to vest the adjudication of workers' compensation claims in a "quasi-judicial" body. JA 142.

> their Services, a Compensation, which shall not be diminished during their Continuance in Office.

U.S. Const. Art. III, § 1. This section requires the Congress to provide certain protections—specifically, life tenure and guaranty against salary diminution—for all judges on Article III courts.[26] The District Court held that the Board was not an Article III court, however, because Congress "expresses clearly which courts enjoy Article III status * * * [and] Congress has not done so here." JA 144-145. The removed members argue that it is not the *label* that Congress uses that determines which adjudicative bodies are Article III courts, but rather the *powers* that Congress vests in them, and the *powers* that Congress vested in the Board, they contend, were those of an Article III court.[27]

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[26] These protections help ensure the independence of the judiciary from the political control of the Executive and Legislative Branches, and thereby help to promote public confidence in judicial determinations. *See* THE FEDERALIST No. 78 (A. Hamilton). The protections also help to attract well qualified persons to the federal bench and to promote judicial individualism. *See* Kaufman, *Chilling Judicial Independence*, 88 YALE L. J. 681, 713 (1979); *see generally* Krattenmaker, *Article III and Judicial Independence: Why the New Bankruptcy Courts are Unconstitutional*, 70 GEO. L. J. 297 (1981); Note, *Article III Limits on Article I Courts: The Constitutionality of the Bankruptcy Court and the 1979 Magistrate Act*, 80 COLUM. L. REV. 560 (1980).

[27] The Secretary urges that the removed members do not have standing to raise the Article III issue. Reply brief for appellants/cross-appellees at 28-29. He notes that all a court is empowered to do is examine Congress' actual grants of judicial power and determine whether such grants are valid. *Id.* at 28. The courts cannot attempt to correct a statute's infirmity by creating Article III judges where Congress has not. Thus the Secretary contends that were the removed members' challenge to succeed, the *necessary* result would be abolition of their offices. *Id.* at 29. Since such relief arguably would not redress the removed members' asserted injuries, the Secretary concludes that the removed members do not

The removed members are correct in pointing out that the District Court employed the wrong test for determining whether Congress has created an Article III court.

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have standing. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, —— U.S. ——, ——, 50 U.S.L.W. 4103, 4105 (Jan. 12, 1982) (claimant must have concrete injury, injury must be traceable to the challenged action, and the court must be able to redress the injury).

We think that Miller and Kalaris do have standing to assert the Article III claim. To begin with, it is a cardinal principle of statutory construction that a court will avoid casting constitutional doubt on a statute where "fairly possible." *Crowell v. Benson*, 285 U.S. 22, 62 (1932). It is "fairly possible" to do so here because Congress was completely silent in the statute as to the Board's Article III status. If we find that Congress did not create an Article III court, then we have no constitutional problem. Similarly, if we find that Congress did in fact create an Article III court, then by finding an implied grant of life tenure in the congressional silence we can avoid the constitutional question. Thus simple rules of statutory construction would instruct us to construe the statute in a way that provides the removed members with standing. Moreover, under the Secretary's construction judges would never be able to sue for the life tenure or salary diminution guaranty provided for in Article III if Congress did not specifically include them in the statute, even if Congress *explicitly* established an Article III court. This would deprive judges of benefits that Congress intended to give and would make a mockery of standing doctrine. Finally, under the Secretary's construction only individual litigants—*e.g.*, employers or employees—would have standing to assert improper deprivation of an Article III judge on an Article III tribunal. Though individual litigants have been found to have standing, *see, e.g., Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, —— U.S. ——, ——, 50 U.S.L.W. 4892, 4894 (June 28, 1982) (hereinafter cited to 50 U.S.L.W. only); *Swain v. Pressley*, 430 U.S. 372, 377 (1977); *Palmore v. United States*, 411 U.S. 389, 394 (1973), the tenure and salary guarantees were designed to benefit judges as well. *See* THE FEDERALIST No. 78 (A. Hamilton) 488-489 (Washington 1818). In sum, we find that the removed members have standing to litigate whether Congress made the Board an Article III court.

While Justice Harlan did once suggest that the only way to tell an Article I court from an Article III court is to examine the "establishing legislation [to see if it] complies with the limitations of [Article III]" [28]—and this does come "dangerously close to saying that Article III courts are those with Article III judges," [29]—*all* of the opinions filed in the Court's latest Article III case, *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, —— U.S. ——, 50 U.S.L.W. 4892 (June 28, 1982) (hereinafter cited to 50 U.S.L.W. only),[30] agree that it is not what Congress *says* but what powers Congress vests in

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[28] *Glidden Co. v. Zdanok*, 370 U.S. 530, 552 (1962) (plurality opinion of Harlan, J.).

[29] *Northern Pipeline Const. Co. v. Marathon Pipe Line Co.*, *supra* note 27, 50 U.S.L.W. at 4909 (White, J., dissenting).

[30] In *Northern Pipeline* the Court held that the Bankruptcy Reform Act of 1978, 28 U.S.C. § 1471(b)(1) (1976 ed., Supp. III), unconstitutionally granted to bankruptcy judges who lacked life tenure and protection against salary diminution jurisdiction over "all civil proceedings arising under title 11 [bankruptcy] or arising in or related to cases under title 11." These bankruptcy judges were empowered to issue final judgments, to enforce their own monetary awards, to conduct all manner of civil proceedings that federal District Courts could conduct, including jury trials, and to exercise all these powers in disputes over liabilities between private citizens. But the bankruptcy judges were appointed only for 14-year terms and were subject to removal by the judicial council of the circuit in which they served on grounds of incompetence, neglect of duty, or disability. Their salaries were set by statute and were subject to adjustment. The Court was divided, with no majority opinion, but agreed that this was an unconstitutional infringement on Article III. Justice Brennan, writing for a plurality, concluded that Congress could not vest most, if not all, of the "essential attributes of the judicial power" in non-Article III judges. 50 U.S.L.W. at 4902. Justice Rehnquist, with whom Justice O'Connor concurred, concluded that Congress could not vest the power to adjudicate traditional state law claims in a federal, non-Article III judge. Justice White, writing for the dissenting Justices, would have upheld the Act as a proper balance of Article I and Article III interests.

the adjudicatory body that counts.[31] What the *Northern Pipeline* plurality, concurring, and dissenting opinions could not agree upon were the circumstances in which Congress could *constitutionally* vest certain traditional attributes of the judicial function in adjudicatory bodies whose judges do not have the benefits of life tenure and the guarantee against salary diminution.[32]

The removed members argue that Congress' amendments to the Act in 1972 endowed the Board with Article III powers and the Board's members with Article III protections.[33] They point to five separate indicia of the

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[31] The plurality and concurring opinions necessarily imply that it is not what Congress *says* that counts because the Bankruptcy Act explicitly said that bankruptcy judges were *not* Article III judges—they had specified terms and could be removed for various causes. But the plurality and concurrence concluded that Congress had nonetheless created something akin to an Article III court. Justice White's *ad hoc* balancing test, proposed in dissent, explicitly rejected congressional statement as the determining factor since his test would have left to the Court the responsibility for striking the final balance between the Article I and Article III interests. *See* 50 U.S.L.W. at 4909.

[32] The immediate controversy in *Northern Pipeline* concerned certain state law claims. Both the plurality and concurring Justices agreed that such state law claims could not constitutionally be adjudicated within the federal system by non-Article III judges. *See* 50 U.S.L.W. at 4901 (plurality opinion); 50 U.S.L.W. at 4903 (concurring opinion). Because this was the sole ground upon which the concurring Justices relied, it was the effective basis of the decision. *See* 50 U.S.L.W. at 4904 n.2 (White, J., dissenting). But the Court reached no agreement concerning what limits Article III places on Congress' ability to create adjudicative institutions designed to carry out *federal* policy and law.

[33] Commentators have differed over whether the Board performs judicial or administrative review. *Compare* Washington, *Benefits Review Board's New Appellate Process Under the Longshoremen's Act*, 11 FORUM 686 (1976) (former Board chairman argues that Board should be treated like an

Board's Article III status: (1) the Board adjudicates cases of "private rights"; (2) the Board exercises a judicial review function previously performed by the federal District Courts; (3) the Board applies the "substantial evidence" test when it reviews administrative law judge decisions; (4) the Board has jurisdiction over admiralty matters; and (5) the Board is free of agency oversight. Reply brief for appellees/cross-appellants at 3. But we do not think that these indicia—taken either alone or together—prove that Congress created an Article III court when it assigned the intermediate review of workers' compensation claims to the Board.

First, there can be no doubt that adjudication of workers' compensation claims involves "private rights." The Supreme Court so characterized such claims when it *approved* the constitutionality of the Act's original scheme, in which deputy commissioners, the subordinates of other Executive officials, rendered the initial determinations. *See Crowell v. Benson*, 285 U.S. 22 (1932). But the Court has never indicated that all *federally* created private rights must be adjudicated in Article III courts. *Northern Pipeline* effectively held that certain private *state* law claims, when adjudicated within the federal system, must be decided by Article III courts.[34] Even the plurality opinion, which would have gone farther than the Court's effective holding, approved the initial determination of "private rights" by non-Article III judges,[35] so long as the "essential attributes of the judi-

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Article III court), *with* Currie & Goodman, *Judicial Review of Federal Administrative Action: Quest for the Optimum Forum*, 75 COLUM. L. REV. 13 (1975) (describing Board as an administrative forum).

[34] *See* note 30 *supra*.

[35] 50 U.S.L.W. at 4899. The *Northern Pipeline* plurality emphasized that Congress' power to assign limited adjudicatory functions to non-Article III judges is in no sense an exception to Article III, and that Article III therefore did

cial power" were reserved in Article III courts.[36] Thus it is clear that Article III does not require Article III judges to perform every stage of adjudication where "private rights" are at stake.

Second, though the Board exercises a review function previously performed by the District Courts, this review function could also have been performed by a non-Article III court under the 1932 version of the Act. Under that version, the District Courts reviewed findings of fact to determine if they were supported by substantial evidence and legal conclusions to see if they were in accordance with law.[37] Because courts could fully review the deputy commissioners' legal conclusions, delegating the initial determination did not "interfere with * * * the exercise by the court of its jurisdiction." *Crowell v. Benson, supra,* 285 U.S. at 49-50. Moreover, because courts reviewed the factual findings to determine if they were supported by substantial evidence, the legislation did not improperly deprive Article III courts of access to the necessary facts.[38] This same scheme has

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not specify any particular limitations on Congress' ability to do so. *Id.* at 4899 n.29. But the plurality emphasized that Congress' adjustment of the manner of adjudication must be sufficiently linked to its legislative power to define substantive rights. *Id.* at 4901-4902; *see also Atlas Roofing Co. v. OHSRC,* 430 U.S. 442, 450 n.7 (1977). Broad delegations like those in *Crowell v. Benson,* 285 U.S. 22 (1932), which the plurality specifically reapproved, *see* 50 U.S.L.W. at 4901, were constitutionally acceptable so long as the "essential attributes of the judicial power" were reserved in an Article III court. *Id.*

[36] 50 U.S.L.W. at 4901.

[37] *See* note 10 *supra.*

[38] *Crowell v. Benson, supra* note 35, 285 U.S. at 49-61. In *Northern Pipeline* both plurality and concurring Justices found this to be an important distinction between the bankruptcy courts, which were subject to only "clearly erroneous" review, and the deputy commissioners. *See* 50 U.S.L.W. at

been preserved in the 1972 version of the Act: the Courts of Appeals review legal decisions to determine if they are in accordance with law and review findings of fact to determine if they are supported by substantial evidence.[39] While the Board applies the same appellate standards, it is simply providing an *additional* level of review.[40] Article III requires only that the ultimate "judicial power" be reserved in the Article III courts; it does not require that all adjudicative bodies exercising the review "standards" that Article III courts exercise be constituted as Article III courts.[41] Thus the fact that the Board replaced the District Court in the new claims pro-

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4902 n.39 (plurality opinion); 50 U.S.L.W. at 4903 (concurring opinion). The Justices were convinced that the degree of appellate review provided for in the bankruptcy context was inadequate since the factual nature of the case would have been shaped at the trial level and the appellate court restricted to considerations of law. *Id.* Thus both *Crowell* and *United States v. Raddatz*, 447 U.S. 667 (1980), were reapproved since those cases provided for appropriate judicial control of both factfinding and legal decisionmaking.

[39] *See* note 18 *supra* and accompanying text.

[40] *See* Currie & Goodman, *supra* note 33, 75 COLUM. L. REV. at 36 (change in judicial review provisions reflects "a congressional judgment that the added opportunity for *administrative* review made the district court review unnecessary and potentially exhausting") (emphasis added).

[41] *Northern Pipeline* held that Congress could not constitutionally *remove* from an Article III court most, if not all, of "the essential attributes of the judicial power" and vest them in a non-Article III adjunct. *See* 50 U.S.L.W. at 4902 (plurality opinion); 50 U.S.L.W. at 4903 (concurring opinion). But it did not hold that an adjunct forum could not exercise some of those powers—like the review function—if they were also *preserved* in an Article III court, a court which freely and independently exercises the ultimate judicial power. Nothing in *Northern Pipeline* prohibits the replacement of a District Court with an adjunct, so long as the "essential attributes of the judicial power" are preserved in an Article III court.

cedure scheme,[42] where more than "traditional" appellate review was maintained in the appellate courts,[43] does not make the Board an Article III court. For the same reasons, the fact that the Board conducts "substantial evidence" review does not so vest it with judicial powers that it must be considered an Article III court.[44]

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[42] It is true that in deciding that Congress created the Court of Customs Appeals under its Article I powers rather than under its Article III powers, the Supreme Court relied on, *inter alia*, the fact that functions of the Court of Customs Appeals had previously been exercised by the Secretary of the Treasury. *Ex Parte Bakelite Corp.*, 279 U.S. 438, 458-459 (1929). But this was only one factor that the Court relied upon, and the Court ultimately concluded that the true test of the Court of Customs Appeals Article III status was the jurisdiction and power conferred upon it. *Id.* at 459.

[43] Traditionally, an appellate court reviews an inferior Article III court's factual findings according to the "clearly erroneous" standard of review. Fed. R. Civ. P. 52(a). *Northern Pipeline* concluded that the "clearly erroneous" test, by itself, did not allow an appellate court sufficient review over non-Article III adjuncts. *See* note 39 *supra*.

[44] The removed members claim that "substantial evidence" review is the distinguishing feature of judicial as opposed to administrative appellate bodies, citing *Federal Radio Comm'n v. Nelson Brothers Bond & Mortgage Co.*, 289 U.S. 266, 276 (1933). But *Nelson Brothers* merely held that the Supreme Court had jurisdiction to review a Court of Appeals decision made under a "substantial evidence" review. 289 U.S. at 278. Under then prevailing doctrine, *see Federal Radio Comm'n v. General Electric Co.*, 281 U.S. 464 (1930), the Court had held that it, as the Supreme Court, could not constitutionally be given final authority to make purely administrative decisions. *Nelson Brothers* simply stated, then, that a court supervising and revising agency findings is making administrative as opposed to judicial decisions and concluded that a court performing "substantial evidence" review is making sufficiently non-administrative decisions—"judicial judgments"—that the Supreme Court could constitutionally have jurisdiction. 289 U.S. at 278. It nowhere stated that *all* tribunals performing substantial evidence review must be Article III courts. Indeed, this latter proposition is counter-intuitive and has no basis in law.

Third, though the Board's jurisdiction includes admiralty cases, and such cases do arise "under * * * the Laws of the United States" within the meaning of Article III, Section 2, the Supreme Court has already decided that non-Article III adjuncts can be constitutionally employed in admiralty and maritime cases. *Crowell v. Benson, supra.* The law is emphatically clear that when Congress creates a substantive federal right, it possesses substantial discretion to prescribe the manner in which that right may be adjudicated—including assigning to an adjunct some functions historically performed by judges. *Northern Pipeline, supra,* 50 U.S.L.W. at 4900. This is what Congress has done with the Board.

Fourth, even if the removed members are correct in asserting that the Board is free from oversight and review of the Executive Branch,[45] it does not follow that the Board is an Article III court and that Board members are Article III judges. Congress can rationally and constitutionally create an administrative framework in which the Executive has only a limited form of control over the administrative appellate process. The test of an Article III court is not how much control the Executive has over an adjudicatory body, but whether an adjudicatory body has enough characteristics of an Article III court. Freedom from oversight is a protection afforded to Article III courts; it is not a test of their existence.

Finally, not only do these indicia not make out an Article III court, many of the other, more "essential attributes of the judicial power" expressly were not vested in the Board. The Board does not have the power

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[45] The litigants dispute whether the Board is free from substantive agency oversight or review. *Compare* brief for appellees/cross-appellants at 5-6; reply brief of appellees/cross-appellants at 5-7, *with* reply brief for appellants/cross-appellees at 11, 15-17. For purposes of this case, we need not resolve this dispute since we find that the Board is not an Article III court.

of the subpoena or the power to punish anyone for contempt.[46] 33 U.S.C. § 927 (1976). The Board possesses only limited powers to issue compensation orders and it must resort to an appropriate District Court to have its orders enforced.[47] *Id.* §§ 921(b)(3), 921(d). The Board's narrow jurisdictional grant extends only "to claims of employees [under the Act]," and not to all potentially related matters.[48] *Id.* § 921(b)(3). It plays only a limited role in reviewing ALJ determinations and obviously does not exercise all of the jurisdiction usually conferred on District Courts.[49] Moreover, the Board does not have to follow the rules of evidence, *id.* § 923, which "govern proceedings in courts of the United States * * *." Fed. R. Evid. 101.

In sum, the removed members have not shown that the 1972 amendments created an Article III court within the Department of Labor. To the contrary, so many of the essential attributes of an Article III court were

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[46] By contrast, the bankruptcy courts in *Northern Pipeline* had the power to issue any order, process, or judgment appropriate for enforcement of the bankruptcy laws and related matters. 11 U.S.C. § 105(a) (1976 ed., Supp. III). They exercised all ordinary power of District Courts, including the power to preside over trials, to issue declaratory judgments, and to issue writs of habeas corpus. 50 U.S.L.W. at 4902.

[47] By contrast, the bankruptcy courts in *Northern Pipeline* could issue final judgments, which were binding and enforceable in the absence of an appeal. 50 U.S.L.W. at 4902.

[48] By contrast, the bankruptcy courts in *Northern Pipeline* had subject matter jurisdiction encompassing not only traditional matters of bankruptcy, but also all "civil proceedings arising under title 11 of arising in *or related to* cases arising under title 11." 28 U.S.C. § 1471(b) (1976 ed., Supp. III) (emphasis added).

[49] By contrast, the bankruptcy courts in *Northern Pipeline* exercised "all the jurisdiction" conferred on the District Courts. 28 U.S.C. § 1471(b) (1976 ed., Supp. III).

omitted that we must conclude that Congress intended to and did create an administrative appellate review board. Congress has the power to place this Board's limited function anywhere it chooses: in a federal court, in an independent agency, or in an Executive agency. *See generally* L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 87-94 (1965). The removed members have not shown that Congress chose the federal court route.[50] We therefore affirm the District Court on this issue.

III. THE BOARD MEMBERS' NON-ARTICLE III STATUS

The removed members failed to prevail on their Article III claim in the District Court. But they also claimed that Congress intended that the Secretary could only remove them for "cause." Though the statute was silent concerning removal,[51] the District Court concluded that Congress must have *intended* to so limit him because of the quasi-judicial duties it assigned to the Board. JA 144. Therefore, the District Court granted the removed members injunctive and declaratory relief on this issue. We find that the District Court was in error.

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[50] This conclusion is consistent with the previous holdings of various circuits, including our own. *See, e.g., Ingalls Shipbuilding Div., Litton Systems, Inc. v. White*, 681 F.2d 275, 285 (5th Cir. 1982) ("administrative proceedings before the Benefits Review Board are not Article III proceedings"); *Potomac Iron Works v. Love*, 673 F.2d 537, 539 (D.C. Cir. 1982) ("The Benefits Review Board is the administrative body with final responsibility for reviewing awards of compensation and related costs."); *Director, OWCP v. O'Keefe*, 545 F.2d 337, 343 (3d Cir. 1976) (the Board provides an "internal administrative review of initial decisions").

[51] 33 U.S.C. § 921(b)(1) (1976) provides:

> There is hereby established a Benefits Review Board which shall be composed of three members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman.

A. *The Rule of Statutory Silence*

The general and long-standing rule is that, in the face of statutory silence, the power of removal presumptively is incident to the power of appointment. *In re Hennan*, 38 U.S. (13 Pet.) 230 (1839); *Cafeteria & Restaurant Wkrs Union, Local 473 v. McElroy*, 367 U.S. 886 (1961). The Supreme Court has noted that "government employment, in the absence of legislation, can be revoked at the will of the appointing officer."[52] *Id.* at 896. And this circuit has recently noted that "this continues to be the rule to the present day." *Nat'l Treasury Employees Union v. Reagan*, 663 F.2d 239, 247 (D.C. Cir. 1981) (no non-statutory protection for federal appointees).[53] Thus the longstanding rule would hold Board members to indefinite terms at their appointing officer's—the Secretary's—discretion.[54]

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[52] In 1912 Congress passed the Lloyd-LaFollette Act, 37 STAT. 555, presently codified at 5 U.S.C. § 7501 (1976 & Supp. V 1981), to give some statutory protection against removal without cause to federal employees generally. For example, the ALJs who hear and determine workers' compensation cases in the first instance cannot be removed except for good cause. 5 U.S.C. § 7521 (Supp. V 1981).

[53] *See also Finley v. Hampton*, 473 F.2d 180, 189 (D.C. Cir. 1972) ("any rights of a Government employee or applicant must be founded on a Congressional statute, expressly or by fair implication, * * * or a constitutional imperative").

[54] Indeed, the rule of silence is of such long-standing tradition that it has taken on constitutional imprimatur: where purely Executive Branch officials are involved, Congress cannot even limit the removal power. *Myers v. United States*, 272 U.S. 52 (1926). *Myers* held unconstitutional a federal statute that conferred on the President the power to appoint postmasters with "the advice and consent of the Senate," but that also required him to obtain the same "advice and consent" in removing them. The Court ruled that to uphold the restriction "would make it impossible for the President, in case of political or other differences with the Senate or Congress, to take care that the laws be faithfully executed." *Id.* at 164. *Myers'* broadest dicta expressed the view that the

1. *The sounds of silence.*

The 1972 amendments to the Act did not specify the length or terms of Board members' service. But there are suggestions in the history of the Act and its subsequent administration that Congress affirmatively intended for Board members, as part of the Department of Labor's staff, to serve as other appointed officials serve—at the discretion of the Secretary.

For one thing, in enacting the 1972 amendments Congress plainly considered a report which recommended that, *inter alia*, members of workers' compensation appeals boards like the Benefits Review Board be appointed for fixed terms with protection against removal.[55] Congress gave "most careful consideration" to this report, *see* H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 4 (1972), but did not adopt the fixed term proposal.[56] Instead, Congress placed the Board "within the Department of Labor" and instructed the Secretary "to keep separate the functions of administering the program and sitting in judgment on

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President's removal powers extended to *all* government employees who were not judges on Article III courts. *Id.* at 135. But subsequent decisions of the Court narrowed the President's powers and cut back on the implications of this dicta. *See, e.g., Weiner v. United States*, 359 U.S. 349 (1958) (War Claims Commissioners sit for congressionally designated terms); *Humphrey's Executor v. United States*, 295 U.S. 602 (1935) (Federal Trade Commissioners sit for congressionally designated terms).

[55] The recommendation was one of many included in the report of the National Commission on State Workmen's Compensation Laws that was issued on July 31, 1972 (Report).

[56] The Report warned that it "might be desirable to hold the [Executive] accountable for agency operations" and that the desire for such accountability was an argument *against* tenure with fixed terms. Report, *supra* note 55, at 102.

the hearings."[57] S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13-15 (1972). Congress gave the Secretary the responsibility of setting "the machinery [of the Board] in motion," *Continental Air Lines, Inc. v. CAB*, 519 F.2d 944, 954-955 (D.C. Cir. 1975), *cert. denied sub nom. Western Airlines, Inc. v. Continental Air Lines, Inc.*, 424 U.S. 958 (1976) (*quoting Power Reactor Development Co. v. Int'l Union of Elec., Radio & Mach. Wkrs.*, 367 U.S. 396 (1961)), and of determining the appropriate manner in which claims should be adjudicated and the Act administered.[58] *See* 33 U.S.C. § 939 (1976) (Secretary charged with duty of issuing regulations to implement the statute).

The Secretary immediately implemented Congress' instructions. In his initial organizational order the Secretary placed the Board within the Office of the Under Secretary of Labor rather than in the Office of the Assistant

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[57] Congress intended that the Board provide "an internal administrative review of initial decisions in contested cases by a three-man board within the Department of Labor. This is the trend of better administered workers' compensation laws and is consistent with the recommendations of the National Commission." S. Rep. No. 92-1125, 92d Cong., 2d Sess. 14-15 (1972); *see also* H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 4 (1972).

[58] Thus the Senate Report states:

> [W]ith the new responsibilities that will devolve upon the Secretary with the passage of this bill it will be extremely important to have full time able administrators who will not also have to wear the dual hat of being hearing officers for purposes of the disputes brought under this statute.
>
> It is also expected that the Secretary take full advantage of the requirement of separating the functions under this statute * * *. It will also be incumbent upon the Secretary as part of this reorganization to revise the regulations under this Act which have not been amended for many years.

S. Rep. No. 92-1125, *supra* note 57, at 14.

Secretary. 20 C.F.R. §§ 801.104, 801.302 (1982).[59] The order explained:

> [Placing the Board within the Office of the Under Secretary] was deemed necessary because the Board's functions are quasi-judicial in character and involve review of decisions made in the course of the administration of the several Acts by the Employment Standards Administration which is headed by an Assistant Secretary. * * *

38 Fed. Reg. 6171 (March 7, 1973). The Secretary, consistent with Congress' intent, *see* S. Rep. No. 92-1125, *supra*, at 13-15, was attempting to insulate the Board from those who would be subject to its review—namely, the Employment Standards Administration, which the Assistant Secretary heads.[60] But the Secretary was not trying to, and did not have to, create an impregnable fortress of protection for the Board.

Thus, pursuant to his statutory authority to issue regulations governing establishment and operation of the Board, 33 U.S.C. § 939 (1976), he promulgated 20 C.F.R. § 801.201(d) (1982), providing that:

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[59] The Secretary delegated to the Under Secretary general rulemaking authority over the Board, and stipulated that the Board could issue procedural rules only "with the approval of the Under Secretary." 20 C.F.R. § 801.302 (1982); Secretary of Labor's Order 38-72, 38 Fed. Reg. 90 (Jan. 3, 1973).

[60] The removed members point to the Secretary's regulation which directs the Under Secretary to promulgate regulations that will allow the Board to function "as an independent quasi-judicial body in accordance with the provisions of the statute," 20 C.F.R. § 801.104 (1982), as proof that the Board was to be totally independent of influence or control. Brief for appellees/cross-appellants at 25. But this reliance is misplaced. The Secretary was directing the Under Secretary to insulate the Board from the Assistant Secretary, not from the Secretary himself. The *internal* division of quasi-judicial and Executive functions was all that the Secretary (and Congress) apparently intended.

> All members of the Board shall serve indefinite terms to be determined in the discretion of the Secretary.

This regulation gave the Secretary *some* control over the Board, a control that Congress might have deemed necessary since the Secretary was to be held accountable for agency operations. The regulation was implemented in 1973 and has been in effect, without interruption,[61] since that time. Thus, from the inception of the 1972 amendments, those charged with administering the statute have consistently construed it as giving the Secretary the traditional power of removal.[62] In the sounds of silence, courts are "duty bound to follow 'the construction of a statute by those charged with its execution . . . unless there are compelling indications that it is wrong." *Haviland v. Butz*, 543 F.2d 169, 174 (D.C. Cir.), *cert. denied*, 429 U.S. 83 (1976) (*quoting Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969)), especially when that construction occurs contemporaneously with enactment of the statute.[63] We cannot find "compelling indications"

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[61] In 1978 the Board, pursuant to its own limited rulemaking powers, *see* 20 C.F.R. § 801.302 (1982), proposed new versions of some of its procedural rules and of the regulations governing its own operations. Although it suggested many changes, it did not propose to change 20 C.F.R. § 801.201(d). *See* 43 Fed. Reg. 42144 (Sept. 19, 1978). Both Miller and Kalaris were Board members at this time, and signed off on the proposed changes. *See id.*

[62] When an agency consistently adheres to a regulation, the courts heighten the deference they give to the agency's interpretation of the governing statute. *See Federal Election Comm'n v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981); *Zenith Radio Corp. v. United States*, 437 U.S. 443, 450 (1978).

[63] *See Zenith Radio Corp. v. United States*, *supra* note 62, 437 U.S. at 450; *see also Adamo Wrecking Co. v. United States*, 434 U.S. 275, 287 n.5 (1978); *E. I. duPont de Nemours & Co. v. Collins*, 432 U.S. 46, 55 (1981); *Natural Resources Defense Council, Inc. v. Train*, 510 F.2d 692, 706 (D.C. Cir. 1975).

that this regulation contravenes the congressional intent in the face of such history. Thus we must defer to the Secretary's interpretation as a sound expression of congressional will.[64]

The Secretary's interpretation of the original congressional intent is further supported by recent floor ac-

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[64] The removed members claim that we should give no deference to the Secretary's interpretation of his removal powers because a reading of this statute does not require "special agency competence or expertise." *Nat'l Petroleum Refiners Ass'n v. FTC*, 482 F.2d 672, 694 (D.C. Cir. 1973), *cert. denied*, 415 U.S. 951 (1974). But deference is "ultimately 'a function of Congress' intent,'" *Process Gas Consumers Group v. U.S. Dep't of Agriculture*, —— F.2d ——, —— (D.C. Cir. No. 79-1336, decided Oct. 1, 1982) (*en banc*) (slip op. at 29) (*quoting Constance v. Sec'y of Health & Human Services*, 672 F.2d 990, 995 (1st Cir. 1982)). Here, Congress assigned the Secretary the duty "of separating the [quasi-judicial and Executive] functions under this statute." H.R. Rep. No. 92-1441, *supra* note 57, at 11. Thus Congress wanted the Secretary to determine, through his experience with the Act's earlier claims procedures, the appropriate degree of independence for the Board.

Courts must give "'great deference to the interpretation given the statute by the officers or agency charged with its administration,'" *EPA v. Nat'l Crushed Stone Ass'n*, 449 U.S. 64, 83 (1980) (*quoting Udall v. Tallman*, 380 U.S. 1, 16 (1965)). *See also Federal Election Comm'n v. Democratic Senatorial Campaign Committee*, *supra* note 62, 454 U.S. at 37 ("deference should presumptively be afforded" to rulemaking agency); *E. I. duPont de Nemours & Co. v. Collins*, *supra* note 63, 432 U.S. at 54-55; *Kirkhuff v. Nimmo*, 683 F.2d 544, 549 (D.C. Cir. 1982). This circuit has previously given deference to the Secretary's interpretation of the statute. *See, e.g., Shahady v. Atlas Tile & Marble Co.*, *supra* note 8, 683 F.2d at 483 (where statute ambiguous regarding proper party to judicial review of order, regulation adopted by court as clear, consistent statement of Act's intent). The same considerations lead us to give deference here.

tivity in Congress.[65] In 1981 Senator Don Nickles, chairman of the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, introduced legislation to make the Board more independent of the administrative arm of the Department of Labor.[66] Senator Nickles explained:

> The 1972 amendments also created a two-step administrative appeal process within the Department of Labor, including a Benefit Review Board whose three members are appointed by the Secretary of Labor and *serve at his pleasure.*

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[65] Legislative history of subsequent legislation is entitled to significant weight in construing earlier, related legislation. *See, e.g., Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 380-381 (1969); *Federal Housing Admin. v. Darlington, Inc.*, 358 U.S. 84, 90 (1958). But legislative history of *non-enacted* subsequent legislative proposals provides a much more "hazardous basis for inferring the meaning of a congressional enactment." *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 118 n.13 (1980). Such legislative history can be "relevant" and "useful," *id.*, but it does not bear a strong degree of reliability. We need not specify *how* relevant and useful the history of this 1981 proposed legislation is in this case; we note it only as additional evidence that the original congressional silence sounded support for the general rule that the power of removal is incident to the power of appointment.

[66] Senator Nickles described S. 1182 as:

> A bill to amend the Longshoremen's and Harbor Workers' Compensation Act to revise the manner of computing the benefits provided under such act, to provide for certification of physicians eligible to provide medical care to workers covered by such act, to provide for an attorney to serve as the representative of the special fund established under such act, *to establish a Benefits Review Board the members of which are appointed by the President*, to establish an advisory committee to evaluate the manner in which the provisions of the act are carried out, and for other purposes[.]

127 Cong. Rec. S5076 (daily ed. May 14, 1981) (emphasis added).

127 Cong. Rec. S5077 (daily ed. May 14, 1981) (emphasis added). Senator Nickles believed that the Board needed a major facelift for it to have the proper degree of independence. He believed that S. 1182 would improve the administration of the Act

> by establishing the Benefits Review Board and administrative law judges as a tribunal independent of the Department of Labor. The members of the Board are to be appointed by the President for fixed terms with the advice and consent of the Senate. The Secretary of Labor and his designees will not participate in litigation before the Board. * * *

Id. at S5078. Thus, not only did Senator Nickles want to prevent the Secretary from removing Board members, he also wanted to elevate Board members to the status of officers of the United States (as opposed to inferior officers) and leave their appointment to the President.

The proposed bill was the subject of intensive debate in the legislative hearings, especially concerning the status of the Board. *See Hearings on Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981 Before the Subcommittee on Labor of the Committee on Labor and Human Resources of the United States Senate*, 97th Cong., 1st Sess. (1981) (1981 Hearings). Then-chairman of the Board, Samuel Smith, testified that:

> The Board performs the same judicial function which the U.S. District Courts exercised prior to 1972. The term of office is indefinite with no procedures for removal. * * *
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> * * *
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> * * * An important change proposed in S. 1181 is the removal of the Board from the Department of Labor and its establishment as an independent agency. * * *

1981 Hearings at 217, 219 (statement of Chairman Samuel Smith). Some other witnesses argued that the Board should be removed from the Department of Labor and

made independent of the Secretary,[67] while other witnesses argued that the Board should remain accountable to the Secretary.[68] But no one argued that the Board was *already* independent of the Secretary; the debate centered on whether change was desirable.[69] Thus it would appear that the current Congress might view the independence of Board members as a *change* from their present status. These are sounds of congressional silence that reinforce the Secretary's present claim of authority to remove Board members at his discretion.

2. *Quasi-judicial functions.*

Despite the Secretary's presumptive right to remove his appointees at his discretion and the administrative

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[67] For witnesses acknowledging Board dependence and favoring a change, *see, e.g.*, 1981 Hearings at 277 (statement of Thomas Wilcox, Executive Director and General Counsel, National Association of Stevedores); *id.* at 1049 (statement of the Alliance of American Industries); *id.* at 1063 (statement of the American Insurance Association); *id.* at 1067 (statement of the National Association of Independent Insurers).

[68] For witnesses acknowledging Board dependence and favoring the status quo, *see, e.g.*, 1981 Hearings at 524 (statement of International Longshoremen's and Warehousemen's Union); *id.* at 993 (statement of Jay Power, Legislative Representative, American Federation of Labor and Congress of Industrial Organizations); *id.* at 1193-1197 (testimony by Department of Labor).

[69] Ultimately, the version of the bill that left the Senate did not adopt fixed terms for Board members, though it would increase the number of persons who could review workers' compensation claims. Section 13 of the bill as it left the Senate permitted the Secretary to appoint four "temporary" appointees to the Board and provided for an *en banc* process in which a majority of the panel sitting could reverse three-member panel decisions. *See* 127 Cong. Rec. S9202 (daily ed. July 27, 1982). The bill is currently pending before the House. *See* brief for appellants/cross-appellees at 24; reply brief for appellants/cross-appellees at 24 n.7.

and congressional history affirming this presumption, the removed members argue that Congress could not have intended to grant the Secretary this influence and control over officials who perform this "quasi-judicial" function of adjudicating "private rights." [70] Rather, to preserve the unbiased, independent judgments of these officials, the removed members claim that Congress must have intended that the Secretary, at a minimum, show "cause" to remove them. The District Court agreed with them, finding that the general rule of silence has no application to officials who perform a "quasi-judicial" function. The District Court drew upon the Supreme Court's decisions in *Humphrey's Executor v. United States, supra,* and *Weiner v. United States, supra,* in constructing this interpretation of the 1972 congressional intent. JA 143-144.

Humphrey's Executor involved President Roosevelt's attempt to remove a member of the Federal Trade Commission (FTC)—an independent regulatory agency that Congress created to perform "quasi-legislative" and

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[70] The Board's "quasi-judicial" function cannot be disputed. The Secretary's own regulations define it as such. *See* note 15 *supra* and accompanying text. *See also* Job Description for Administrative Appeals Judge, JA 95-98 (judges exercise independent judgment in discharging their duties and responsibilites); Justification for Classification of Supergrade Position, JA 99-102 (the Board serves as a "constitutional court," and its "final decision making authority/independence of operation is truly *unique* in Government * * * in that other appeal boards are subject to the general direction and supervision of Agency Heads/higher level agency officials who have the authority to review board decisions") (emphasis in original).

Likewise, the fact that the Board adjudicates cases of "private rights" cannot be disputed. *See* notes 34-36 *supra* and accompanying text. The Supreme Court previously characterized workers' compensation claims as cases of "private rights" in *Crowell v. Benson, supra* note 35, 285 U.S. at 51, and reaffirmed this characterization in *Northern Pipeline Const. Co. v. Marathon Pipe Line Co., supra* note 27, 50 U.S.L.W. at 4899.

"quasi-judicial" tasks [71] without cause.[72] Congress established the FTC as a body independent of the Executive Branch, prescribed fixed terms for its commissioners, and stipulated the exclusive terms for their removal to be "inefficiency, neglect of duty, or malfeasance in office." 295 U.S. at 620. In rejecting President Roosevelt's claim to discretionary removal power over FTC Commissioners, the Supreme Court stated:

> The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in discharge of their duties independently of executive control cannot be well doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. For it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will.

Id. at 629. Thus *Humphrey's Executor* trimmed back considerably on the broad, constitutionally-based removal powers the President had hitherto enjoyed.[73]

Weiner presented the Supreme Court with a very similar presidential effort to exercise broad removal powers. In *Weiner* the Court ruled that President Eisenhower could not remove members of the War Claims Commission

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[71] 295 U.S. at 624. On the organization, history, and reorganization of the FTC, *see* S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 725-794 (1979); Elman, *Administrative Reform of the Federal Trade Commission*, 59 GEO. L. J. 777 (1971). *See generally* Posner, *The Federal Trade Commission*, 37 U. CHI. L. REV. 47 (1969).

[72] 295 U.S. at 618-619 (removal not a reflection on the commissioner or his services). For commentary on *Humphrey's Executor*, *see* S. BREYER & R. STEWART, *supra* note 71, at 88-90, 92-95; K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 1.09-1 at 15-19 (1977); L. JAFFE, JUDICIAL CONTROL OF ADMINISTRATIVE ACTION 21-23 (1965).

[73] *See* note 54 *supra*.

(WCC)—the body responsible for making final determinations regarding awards to those suffering injury or property damage at the hands of the enemy during World War II—at his discretion.[74] Congress placed the WCC outside the Executive Branch, gave the Commission itself (and thus its members) a limited term of three years, and stipulated that the Commission's decisions were not "subject to review by any other official of the United States or by any other court by mandamus or otherwise * * *." 357 U.S. at 354-355. But nothing was explicitly said in the Act about removal. So the Court noted that it was faced with "another instance in which the most appropriate legal significance must be drawn from congressional failure of explicitness. Necessarily this is a problem in probabilities." *Id.* at 352-353. Based on all the limits Congress placed on Executive power in the Act, the Court concluded that Congress did not intend to allow the President to remove WCC commissioners at his discretion. *Id.* at 354-356.

But *Humphrey's Executor*'s FTC and *Weiner*'s WCC were structurally very different from the Board, and it was these structural differences that prompted the Court to limit the Executive's removal power. To begin with, both FTC and WCC members had fixed terms, FTC members' terms being fixed by statute and WCC members' terms being fixed by the limited life of the Commission. *Humphrey's Executor*, which was the foundation of the *Weiner* decision, *see* 357 U.S. at 352, 354, 356, went to great lengths to limit its holding to cases where Congress had defined fixed terms for agency members.[75] 295 U.S.

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[74] For commentary on *Weiner*, *see* S. BREYER & R. STEWART, *supra* note 71, at 90-95; K. DAVIS, *supra* note 72, § 1.09-1 at 15-19; L. JAFFE, *supra* note 72, at 21 n.27. For additional judicial elaboration, *see Morgan v. TVA*, 115 F.2d 990 (6th Cir. 1940), *cert. denied*, 312 U.S. 701 (1941).

[75] The Court stated:

> The authority of Congress, in creating quasi-legislative or quasi-judicial agencies, to require them to act in dis-

at 622, 631-632. *Humphrey's Executor* stated that the facts before it were "plainly and wholly different" from the facts in cases such as *Shurtleff v. United States*, 189 U.S. 311 (1903), which held that officers whose terms are not fixed by statute serve at the pleasure of the officers who appoint them.[76] *Id.* at 621-623.[77] Second, both the

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charge of their duties independently of executive control cannot be well doubted; and that authority includes, as an appropriate incident, power to fix the period during which they shall continue in office, and to forbid their removal except for cause in the meantime. * * *

* * * *

* * * Whether the power of the President to remove an officer shall prevail over the authority of Congress to condition the power by fixing a definite term and precluding a removal except for cause, will depend upon the character of the office; the *Myers* decision, affirming the power of the President alone to make the removal, is confined to purely executive officers; and as to officers of the kind here under consideration, we hold that no removal can be made during the prescribed term for which the officer is appointed, except for one or more of the causes named in the applicable statute.

295 U.S. at 629, 631-632.

[76] *Shurtleff v. United States*, 189 U.S. 311 (1903), rejected the claim of a general appraiser, whose term was not fixed by statute, that he could not be removed at the pleasure of the appointing authority. The Court stated:

> We are asked [to adopt a construction of the Act which] results in the creation of a tenure of this particular office, not attached to a single other civil office in the government, with the exception of judges of the courts of the United States. We cannot bring ourselves to the belief that Congress ever intended this result while omitting to use language which would put that intention beyond doubt. * * *

189 U.S. at 318.

[77] *Humphrey's Executor* placed equal weight on both the statutorily provided fixed terms and the stated grounds for removal. 295 U.S. at 631-632. The removed members here

FTC and the WCC were placed *outside* the Executive Branch, as separate, independent tribunals.[78] The Board, by contrast, was placed "within the Department of Labor," [79] as an "internal" administrative appellate review board,[80] and it relies very much on the Department for its effective day-to-day operations.[81] Third, the Executives removing both FTC and WCC commissioners did not rely on previously promulgated regulations interpreting the congressional silence; rather, they acted in contravention of explicit congressionally-mandated terms of office. By contrast, here the Secretary relies on his own regulation promulgated a decade ago. Such a regulation deserves the deference of this court, absent compelling indications that it is wrong. *See* note 64 *supra*. Fourth, and finally, both the FTC and the WCC members were made officers of the United States, appointed by the President with the advice and consent of the Senate. 295 U.S.

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properly point out that the act creating the WCC, like the act creating the Board, was silent on the grounds for removal. Brief for appellees/cross-appellants at 20-22. But the failure to specify the grounds for removal does not make the WCC enough like the Board to bring this case within *Weiner*'s logic. FTC and WCC share many attributes: fixed terms of office, the mode of member appointment, their separation from any Executive agency, clear expressions by Congress of an intent that they function independently, and performance of functions which was furthered by their independence. It was these shared attributes that allowed *Humphrey's Executor* and *Weiner* to limit the Executive's removal power. The Board shares few of these attributes.

[78] The FTC is an independent regulatory agency, a member of the so-called "headless fourth branch." L. JAFFE, *supra* note 72, at 22. The WCC had final authority over war claims, completely free of the Federal Security Administrator. S. Rep. No. 1742, 80th Cong., 2d Sess. (1948).

[79] S. Rep. No. 92-1125, *supra* note 57, at 14-15.

[80] *Id.*

[81] *See* note 15 *supra*.

at 620; 357 U.S. at 350. Board members, by contrast, are inferior officers of the United States, appointed by the Secretary of Labor. Had Congress wished to give Board members something more than the "lesser dignity" of officials appointed and removable at the discretion of the respective heads of their departments, it could have said so explicitly.[82] But it chose to remain silent.

In short, *Humphrey's Executor* and *Weiner* involved structurally distinguishable entities and do not serve as appropriate support for the removed members' claim. Indeed, the Supreme Court's decisions in *Reagan v. United States*, 182 U.S. 419 (1901), and *In re Hennan*, 38 U.S. (13 Pet.) 230 (1839), are more clearly on point and control this case. In *Reagan* the Court held that the commissioners of Indian Territory, inferior officers who performed entirely judicial functions—like justices of the peace—were removable at will in the absence of a congressionally fixed term.[83] 182 U.S. at 426-427. In *Hennan*

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[82] *See* Currie & Goodman, *supra* note 40, 75 COLUM. L. REV. at 14 (distinguishing "independent regulatory commissions, whose members are appointed by the President with congressional approval and [who] enjoy a secure, if limited, tenure" from those "quasi-judicial tribunals" of "lesser dignity" which are staffed "by members appointed and removable at will by the respective heads of their departments," and giving the Board as an example of the latter).

[83] The removed members seek to bypass *Reagan v. United States*, 182 U.S. 419 (1901), by arguing that *Humphrey's Executor* and *Weiner* have significantly impaired or destroyed its precedential value. Brief for appellees/cross-appellants at 35. This argument rests on a wholly contorted reading of all three cases. *Humphrey's Executor* and *Weiner* involved presidential appointments for fixed terms; the *Reagan* Court specifically noted that the Indian commissioners were inferior officers, "not holding their offices for life, or by any fixed tenure, and * * * within the settled rule that the power of removal is incident to the power of appointment." 182 U.S. at 414. We find *Reagan* to be good law and controlling precedent.

the Court found that a District Court judge could remove, at his discretion, a clerk of the court since no tenure in office was specified in either the Constitution or the statute.[84] 38 U.S. (13 Pet.) at 259. The *Hennan* Court stated:

> All offices, the tenure of which is not fixed by the Constitution or limited by law, must be held either during good behaviour, or (which is the same thing in contemplation of law) during the life of the incumbent; or must be held at the will and discretion of some department of the government, and subject to removal at pleasure.
>
> It cannot, for a moment, be admitted, that it was the intention of the Constitution, that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made[?] In the absence of all constitutional provision, or statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment. * * *

Id. See also DeCastro v. Board of Comm'rs of San Juan, 322 U.S. 451, 462 (1944) (interpreting a statute so that implying life tenure for a large group of "municipal employees [would be] in disregard of the rule of *Shurtleff v. United States*"); *Nat'l Treasury Employees Union v. Reagan*, 663 F.2d 239, 246-248 (D.C. Cir. 1981) (relying on *Hennan*). These cases conclusively demonstrate that, in the absence of a congressional statement to the contrary, inferior officers such as those on the Board serve

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[84] The District Court attempted cursorily to distinguish *Reagan* and *Hennan* by referring to the exception to the general rule that is "implied by the nature of the office." JA 144. But the Board is materially different from the offices discussed in *Humphrey's Executor*, *Weiner*, and Article III. Moreover, it seems much like the offices established in scores of other administrative systems. *See* notes 98-101 *infra* and accompanying text. Thus we do not understand how the Board fits into the *Hennan* exception.

indefinite terms at the discretion of their appointing officers.[85]

B. *Constitutionality of the Organizational Scheme*

We thus hold that Congress intended to create a Board whose members serve indefinite terms at the discretion of their appointing officer.[86] The Secretary can therefore remove these members at his discretion unless there is some constitutional impediment to his doing so.[87] The District Court found that it would be unconstitutional for the Sec-

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[85] The removed members concede that their procedural arguments for notice and hearing stand or fall with the substantive arguments concerning the Secretary's discretion to remove them without cause. *See* brief for appellees/cross-appellants at 12-13. Since we find that the Secretary can remove at his discretion, we accept the removed members' concession and do not address the procedural arguments. Since we find that these Board members can be *removed* at the Secretary's discretion, we need not address whether the Secretary could *transfer* them without notice and hearing were "cause" a requirement. *Cf.* brief for appellants/cross-appellees at 26 n.25 (pointing out that this was a *transfer*, not a *dismissal*).

[86] We reach this conclusion on the basis of *all* of the available evidence: the presumption that the removal power is incident to the appointment power, Congress' silence in the face of this presumption, the pre-enactment legislative history, the Secretary's contemporaneous and consistent interpretation of his authority, and the recent floor activity to amend the Act.

[87] Though the removed Board members have not pressed the argument, the Secretary notes that they could alternatively challenge the discretionary actions as arbitrary and capricious, *see* 5 U.S.C. § 706(2)(A) (1976 & Supp. V 1981), as an abuse of discretion. *See* brief for appellants/cross-appellees at 17-19. But the Secretary acted pursuant to a valid regulation, and the removals therefore cannot be characterized as arbitrary or capricious or not in accordance with law. Neither can the underlying regulation be challenged as irrational: the Secretary is free to promote the efficiency of the Department by making Board members accountable, at least in some degree, to him.

retary to have a power of removal over Board members because such a power would "permit him to influence claims decisions outside the adjudicatory process through replacement of the entire Board." JA 142. But it avoided bringing the constitutionality of the organizational scheme into question by finding that Congress intended to make the Board independent of the Secretary.[88] Since we find that Congress intended Board members to serve at the Secretary's discretion, we must judge the constitutionality of the organizational scheme.[89] We find that assignment

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[88] The District Court expressly did not decide whether Congress could constitutionally assign the functions of the Board to the Secretary. JA 144. Our holding necessarily encompasses this question as well.

[89] There is a legitimate question as to whether the removed Board members have standing to challenge the constitutionality of Congress' decision to make them serve at the discretion of their appointing authority. *Cf.* note 27 *supra* (no insuperable standing issue under Article III where the Act could be interpreted to have created an Article III court). At an irreducible minimum, Article III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976). *See generally Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, *supra* note 27. Obviously, the removed Board members here have suffered an actual injury from their removal by the Secretary. Their injury can be traced to his removing them without hearing or explanation. But it is not clear that their injury will be redressed by a favorable decision.

A court is empowered to examine Congress' jurisdictional grants and to determine whether such grants are valid. The courts cannot correct an invalid grant by filling in one of a variety of constitutional terms. Rather, the most a court can do is void the Board's jurisdictional grant and leave to Congress the decision of how to reconstitute the workers'

of initial review of adjudication of workers' compensation claims to an administrative review board whose members serve at the discretion of their appointing officer is clearly constitutional.

Under our constitutional scheme, tenure in office is during good behavior, for statutorily fixed periods and stipulated terms, or at the discretion of the appointing

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compensation claims adjudicatory mechanism. *Cf. Northern Pipeline Const. Co. v. Marathon Pipe Line Co., supra* note 27, 50 U.S.L.W. at 4902 (remanding to Congress the decision of how to reconstitute the bankruptcy courts). The most we can do here is declare void the congressional authorization that allows the Secretary to determine the terms upon which Board members serve; we cannot grant these Board members the terms they would prefer. But this constitutional declaration involves abolition of the very offices the removed members seek to retain. Thus it is difficult for us to discern whether remanding to Congress to provide appropriate protections or to change the adjudicatory structure would adequately redress the removed members' injuries.

The District Court apparently assumed that the removed members had standing to challenge the constitutionality of the Act, and the parties did not adequately brief the issue. Thus we do not have sufficient information to resolve whether their injuries would be adequately redressed.

Nevertheless, we state our views on the constitutionality of the Act to prevent future litigation over this constitutional issue. The Supreme Court has already decided that adjudication of workers' compensation claims can constitutionally be delegated, at least in the initial stage, to administrative adjuncts. *Crowell v. Benson, supra* note 35. The 1972 amendments to the Act did not change the initial adjudicatory mechanism; the amendments merely created an additional stage of administrative review. All we decide is that *Crowell* remains dispositive of the constitutionality of the congressional delegation. Such an obvious holding does not endanger any of the policies implicit in Article III which forebode against deciding cases where the alleged injury may not be redressed by a favorable decision. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., supra* note 27, —— U.S. at ——, 50 U.S.L.W. at 4105-4106 (discussing such policies).

officer. *In re Hennan, supra; Nat'l Treasury Employees Union v. Reagan, supra.* The Constitution *mandates* that members of Article III courts have life tenure during good behavior. The Constitution *permits* Congress to establish fixed terms for members of tribunals that are independent of the Executive Branch; when Congress statutorily specifies the terms of tenure and removal for United States officials it does not infringe upon the autonomy of the Executive Branch. But where Congress has neither created an Article III court nor established by legislation the terms for tenure and removal, the Constitution leaves the tenure of these officers to the discretion of the appointing officer. *Cafeteria & Restaurant Wkrs Union, Local 473 v. McElroy, supra; Myers v. United States, supra; Reagan v. United States, supra.* Properly understood, these tenure rules are part of the careful balance of structural separation of powers limitations and protections that the Constitution places on Congress, the Executive, and the courts.

The District Court found, and we agree, that the Board is not an Article III court and therefore that the Constitution does not require that its members serve during good behavior. JA 144-145. But the District Court, invoking separation of powers principles, concluded that Board members could not constitutionally be removed at will; it found that the Constitution *requires* Congress to create "quasi-judicial" bodies that are independent of the appointing officer. JA 144. Quoting from *Humphrey's Executor, supra,* 295 U.S. at 629-630, the District Court explained:

> The fundamental necessity of maintaining each of the three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution;

> and in the rule which recognizes their essential co-equality. * * *

JA 142. It found support for its application of separation of powers principles in both *Humphrey's Executor* and *Weiner*.[90]

But the District Court misinterpreted the Supreme Court's discussion of separation of powers principles in both *Humphrey's Executor* and *Weiner*. *Humphrey's Executor* did not hold that Congress was *required* to make FTC commissioners independent of the President; rather, it decided that separation of powers limitations and protections *allowed* Congress to supplant the President's traditional removal authority. Similarly, *Weiner* did not hold that Congress was *required* to make WCC commissioners independent of the President; rather, it decided that separation of powers limitations and protections *allowed* Congress to do so. In each case the Court looked to the function the administrative body was to perform to determine if Congress was infringing upon the Executive's constitutional power, not to see if the Executive was infringing upon the administrative agency's adjudicative function.[91] *See* note 75 *supra*.

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[90] JA 141 ("The Supreme Court looks to the functions of an administrative body in determining whether Congress intended the Executive branch of government to be able to remove its officers at will. *Weiner v. United States*, 357 U.S. 349, 353 (1958); *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935)."); JA 144 ("The nature of the Board's duties requires independence from the Secretary. The Board is analogous to the positions of Federal Trade Commissioner in *Humphrey's Executor v. United States, supra*, and War Claims Commissioner in *Weiner v. United States, supra*.").

[91] There are constitutional limitations on commingling of Executive and adjudicatory functions, but these arise out of the due process clause, not separation of powers principles. *See, e.g., Connally v. Georgia*, 429 U.S. 245 (1977) (*per curiam*); *Withrow v. Larkin*, 421 U.S. 35 (1974); *In re Murchison*, 349 U.S. 133 (1967). The removed members have not raised and

Indeed, the Supreme Court has already decided that Congress can constitutionally confer on an administrative adjunct jurisdiction to decide the liability of an employer to an employee under the Act. *Crowell v. Benson*, *supra*, 285 U.S. 22.[92] *Crowell* held that Congress could constitutionally assign the initial determination of workers' compensation claims to deputy commissioners, the subordinates of the Act's Executive officers. *Id.* at 51, 54. *Crowell* determined that this scheme satisfied the constitutional mandate of separation of powers embodied in Article III [93] and did not improperly withdraw necessary questions from judicial consideration or "interfere with * * * the exercise by the court of its jurisdiction * * *." *Id.* at 49-50.

Of course, the Act as presently codified differs from the *Crowell* version. ALJs now perform the initial adjunct adjudicatory function that the deputy commissioners per-

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could not raise such due process allegations here because they cannot be subject to the potential unfairness in adjudication that due process protects against.

[92] *Northern Pipeline* expressly reaffirmed *Crowell*'s holding on the use of adjuncts in adjudication of federal statutory rights. 50 U.S.L.W. at 4898-4900. *Crowell's* other holding, with respect to review of "jurisdictional" and "constitutional" facts, has been undermined in later cases. *See, e.g., St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 53 (1936). *See generally* 4 K. DAVIS, ADMINISTRATIVE LAW TREATISE §§ 29.08, 29.09 (1st ed. 1958).

[93] We do not hold that separation of powers principles and Article III requirements are synonymous. Nor do we ignore the fact that due process concerns may prohibit some commingling of functions. *See* note 91 *supra*. We simply hold that for purposes of deciding whether the Secretary can remove Board members at his discretion, separation of powers principles and Article III provide coextensive instructions. We cannot see how these constitutional arguments differ for determining the discretionary removal issue.

formed before the 1972 amendments.[94] And the Board now performs the initial appellate review that the District Courts used to perform.[95] But the "essential attributes of the judicial power" remain in the Article III courts, and the Board is simply an additional layer of administrative review.[96] Thus, for constitutional purposes, the organizational scheme created in the 1972 amendments does not differ from the *Crowell* version. *Crowell*, therefore, is dispositive of this case.

The removed members are certainly correct in characterizing the Board as performing a "quasi-judicial" function.[97] But this general characterization does little to distinguish the Board, constitutionally, from the scores of administrative boards and tribunals in the Executive Branch that currently adjudicate claims to federal statutory rights. *See generally* S. BREYER & R. STEWART, ADMINISTRATIVE LAW AND REGULATORY POLICY 37-102 (1979). Many statutes directly grant the Executive power to remove officials performing quasi-judicial tasks.[98]

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[94] *See* notes 11-13 *supra* and accompanying text. *See also Atlas Roofing Co. v. OSHRC*, *supra* note 35, 430 U.S. at 450 n.7.

[95] *See* notes 17 & 37-42 *supra* and accompanying text; *see generally* notes 46-50 *supra* and accompanying text.

[96] *See* note 40 *supra* and accompanying text; *see generally* notes 46-50 *supra* and accompanying text.

[97] *See* note 15 *supra*.

[98] *See, e.g.*, Federal Services Impasses Panel, 5 U.S.C. § 7119(c)(3) (Supp. V 1981) (Panel member "may be removed by the President"); *id.* § 7119(c)(5)(B) (duties of Panel include "hold[ing] hearings," "administer[ing] oaths, tak[ing] testimony," in the course of resolving negotiation impasses between government agencies and unions); Board of Directors, National Consumer Cooperative Bank, 12 U.S.C. § 3013 (Supp. V 1981) (President may remove any member at any time with or without cause); *id.* § 3023 (Board of Directors hears appeals from denials of applications for assistance).

Other statutes grant broad delegatory powers pursuant to which heads of agencies have required members of "quasi-judicial" boards to serve at their discretion.[99] And many other statutes authorize agency heads to influence or control indirectly the adjudications of their "quasi-judicial" boards.[100] The removed members have not shown how these other tribunals and boards differ, either structurally or functionally, in a constitutionally significant sense.[101]

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[99] *See, e.g.*, Department of Justice, Board of Immigration Appeals, 8 U.S.C. § 1103 (1976); 8 C.F.R. § 3.1 (1982) (members appointed by the Attorney General "shall serve at his discretion" and perform the quasi-judicial function of adjudicating cases coming before the Board; claims heard include deportation and exclusion of aliens, imposition and collection of fines); Department of Health and Human Services, Departmental Fellowship Review Panel, 45 C.F.R. § 10.1 (1981) (hearings on denial/discontinuance of fellowship/traineeship award by constituency agency); *id.* § 10.2 ("panel of 12 members selected by the Secretary, for such terms as may be designated by him").

[100] *See, e.g.*, Department of Health and Human Services, Provider Reimbursement Review Board, 42 U.S.C. § 1395 (1976) (Board reviews denials of Medicare reimbursement to hospitals; review of Board's decision by Secretary at his discretion); Department of Defense, Board of Correction of Military Records, 10 U.S.C. § 1552 (Supp IV 1980); 32 C.F.R. § 723.2 (1982) (members of Board appointed by Secretary of a military department); *id.* § 723.6 (final review by Secretary of Navy of Board decisions); Department of Housing and Urban Development, Board of Contract Appeals, 24 C.F.R. § 20.4(b) (1982). Other examples may be found in brief for appellants/cross-appellees at 14-16 nn.14 & 16.

[101] The removed members press three ultimately unpersuasive grounds on which to distinguish the Board from the scores of other tribunals and boards in the Executive Branch. First, they argue that many "quasi-judicial" boards can be distinguished because they are created by regulation rather than, as is the Board, by statute. This distinction *could* be a persuasive one for purposes of determining congressional intent, but it cannot be one for supporting a constitutional distinction. The constitutional requirement of independence—of separat-

Nor have they indicated why the additional degree of independence and protection they seek is essential for dispassionate decisionmaking under this statute, and not others, for constitutional purposes.[102] Congress has been

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ing the adjudicator from the administrator—must arise either from the attributes of the judicial power that the Board is vested with (no matter by whom) or from the danger of bias inherent in the commingling of powers. The constitutional requirement of independence has little to do with the source of creation of the adjudicatory power. In any event, in this case Congress did not even intend to keep the Board independent of the Secretary: it gave him the responsibility of issuing regulations to govern the Board. Thus the purported distinction is inadequate on all counts. Second, they argue that this Secretary, unlike other appointing officers, has no oversight or review powers. But however accurate this charge might be—and we do not decide this issue—it does not state a constitutional difference. Freedom from oversight is a protection accorded to constitutional courts; it is not a test of their existence. Indeed, mere freedom from review could not even decide the issue of congressional intent: Congress could rationally create an administrative board with *some* (as opposed to complete) accountability to the agency head. The removal power would provide this indirect source of accountability. Third, they argue that some administrative boards are not confined to adjudicating private rights, but also possess policymaking roles. Again, this distinction has no constitutional import: the degree of decisional independence constitutionally required does not vary with the additional nonjudicial duties that a tribunal is asked to perform. Rather, as the earlier discussion of *Northern Pipeline* indicates, the degree of independence required varies with the judicial attributes that are placed in a particular adjudicatory body. The purported distinction merely underscores the fact that Congress does not keep quasi-judicial functions strictly isolated from Executive functions. In sum, the three purported distinctions cannot distinguish the other Executive tribunals for either constitutional or congressional intent purposes.

[102] Indeed, it is unlikely that the removed members could even prove factually that tenure protections of the sort they seek add to the dispassion of decisionmaking. Whatever the framers may have initially thought, untenured judges, without

creating quasi-judicial boards subject to Executive control for years,[103] and the courts have not previously prevented them from doing so. To do so now "would be to turn the clock back on at least a * * * century of administrative law," *Sunshine Anthracite Coal Co. v. Adkins*, 310 U.S. 381, 400 (1940) (rejecting challenge to quasi-judicial authority delegated to the Department of the Interior in the Bituminous Coal Conservation Act of 1935), and would unnecessarily call into constitutional question the validity of the many quasi-judicial boards whose judgments are subject to the direct or indirect control of the Executive Branch. We refuse to do either.

IV. CONCLUSION

The long-standing rule relating to the removal power is that, in the face of congressional silence, the power of

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secure salaries, can, in many cases, dispense justice evenhandedly. Krattenmaker, *supra* note 26, 70 GEO. L. J. at 306; *cf.* Posner, *The Behavior of Administrative Agencies*, 1 J. LEGAL STUD. 305, 328 (1972) (testing empirically and finding little evidence to support the hypothesis that combining administrative and adjudicative functions in a single agency produces unfairness). In this regard, it is interesting to note that virtually no state system provides for life tenure of its judges, *see* S. Rep. No. 405, 91st Cong., 2d Sess. 8 (1970), but these systems, for the most part, are capable of fairly handling day-to-day legal disputes. *See* Bator, *The State Courts and Federal Constitutional Litigation*, 22 WM. & MARY L. REV. 605, 623-635 (1981).

[103] Congress has successfully established Article I courts both to administer statutes in the territories, *see American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 541 (1828), and the District of Columbia, *see Palmore v. United States*, *supra* note 27, 411 U.S. at 394, and to serve the military, *see O'Callahan v. Parker*, 395 U.S. 258 (1969). It has also constitutionally created legislative courts, magistrates, and administrative agencies to adjudicate public rights and to serve as adjuncts to the federal courts. *See United States v. Raddatz*, *supra* note 38; *Atlas Roofing Co. v. OHSRC*, *supra* note 35, 430 U.S. at 450.

removal is incident to the power of appointment. We can find nothing in Article III or this Act which interdicts this long-standing rule. All of the available evidence indicates that Congress intended to allow the Secretary to remove these Board members in his discretion, and nothing in Article III, separation of powers principles, or the decisions of the Supreme Court prevents Congress from doing so. Thus the judgment of the District Court is

Affirmed in part [104] *and reversed in part.*[105]

[104] *See* note 50 *supra* and accompanying text.

[105] *See* notes 85-86 *supra* and accompanying text.

APPENDIX B

Opinion, Order and Judgment of the United States District Court for the District of Columbia

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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action Nos. 82-1278
82-1406

IN RE BENEFITS REVIEW BOARD LITIGATION,
JUDGES KALARIS and MILLER

Filed June 2, 1982

MEMORANDUM OPINION

This consolidated action is before the Court on plaintiffs' motion for summary judgment and defendants' motion to dismiss or, in the alternative, for summary judgment. The facts are not in dispute. The Secretary of Labor (the Secretary) seeks to dismiss plaintiffs Ismene M. Kalaris and Julius Miller from their positions as administrative appeals judges of the three-member Benefits Review Board (the Board). The Secretary thus seeks to replace two-thirds of the members of the Board at one time. The question presented is whether Congress intended the Secretary to be able to terminate Board members at will. The Court answers this question in the negative. Accordingly, plaintiffs' motion is granted and defendants' motion is denied.

Congress established the Board in 1972 by amendment to the Longshoremen's and Harbor Workers' Com-

pensation Act (the Longshoremen's Act), 33 U.S.C. § 921(b)(1). The Board reviews decisions of administrative law judges concerning worker compensation claims under the Longshoremen's Act; Title IV of the Federal Mine Safety and Health Act ("black lung" disability), 30 U.S.C. § 922; the Defense Base Act, 42 U.S.C. § 1651 *et seq.*; the District of Columbia Workmen's Compensation Act, 36 D.C. Code § 301 *et seq.*; the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.*; and the Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171 *et seq.* Appeals from the Board's decisions are taken directly to the Court of Appeals for the circuit in which the injury occurred. 33 U.S.C. § 921(c).

The Secretary has the right to appeal every decision of the Board. *Shahady v. Atlas Tile & Marble Co.*, No. 81-1818, slip op. at 8 (D.C. Cir. Feb. 26, 1982). Through the Director of the Office of Workmen's Compensation Programs, the Secretary is a party in interest in a substantial number of cases heard by the Board.

In the statute establishing the Board, Congress directed the Secretary to appoint its three members but failed to provide grounds for removal or definite terms of office. 33 U.S.C. § 921(b)(1).

The legislative history indicates that Congress was concerned with separating the functions of administering the compensation program and sitting in judgment on the claims. S. Rep. No. 92-1125, 92d Cong., 2d Sess. 13, 14 (1972). Congress created the Board to replace review of claims decisions by the United States District Courts. *Id.* 14.

The Supreme Court looks to the functions of an administrative body in determining whether Congress intended the Executive branch of government to be able to remove its officers at will. *Wiener v. United States*, 357 U.S. 349, 353 (1958); *Humphrey's Executor v. United States*, 295 U.S. 602, 628 (1935). The Court "must not be misled

by a name, but look to the substance and intent of the proceeding" *Federal Radio Commission v. Nelson Bros. Bond & Mortgage Co.*, 289 U.S. 266, 277 (1933).

The Board possesses four quasi-judicial functions. It reviews facts under a substantial evidence standard; reviews the law, including the constitutional validity of regulations issued by the Secretary; adjudicates rights deriving originally from private causes of action; and lacks rulemaking or policymaking authority. The nature of these functions is further clarified by the Board's assumption of jurisdiction formerly belonging to the District Courts, and the Board's absence as a party on appeal of its decisions.

The Secretary recognizes the Board's independent and quasi-judicial status in regulations governing the establishment and operation of the Board. 20 C.F.R. §§ 801.103, 801.104. The same regulations, however, provide that Board members serve "indefinite terms to be determined in the discretion of the Secretary." *Id.* § 801.201(d). To adopt the Secretary's interpretation in 20 C.F.R. § 801.201(d) would make 29 U.S.C § 921 unconstitutional. The Secretary's interpretation would permit him to influence claims decisions outside the adjudicatory process through replacement of the entire Board. As the Supreme Court noted in *Humphrey's Executor v. United States*, *supra* at 629-30:

> The fundamental necessity of maintaining each of the three general departments of government entirely free from the control of coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality.

The Supreme Court held in *Humphrey's Executor* that the quasi-judicial and quasi-legislative authority of the Federal Trade Commission protected its members from removal at will under fundamental notions of separation of powers.

The same principle applies to the Benefits Review Board. Congress certainly did not intend to permit the Secretary to pack this independent and quasi-judicial tribunal, "for it is quite evident that one who holds his office only during the pleasure of another, cannot be depended upon to maintain an attitude of independence against the latter's will." *Id.* at 629. The Court holds that the Longshoreman's Act does not permit removal of Board members by the Secretary at will. The Secretary's purported dismissal of plaintiffs from their positions without cause asserted therefore violates 33 U.S.C. § 921(b)(1). Admittedly, Section 921(b)(1) is not well-drafted. Members of other quasi-judicial or quasi-legislative bodies have definite terms, staggered to avoid a mass exodus. Through staggered, definite terms, Congress limits control of the Executive branch over quasi-judicial and quasi-legislative decisions.

Defendants rely primarily upon cases in which officials removed at will had purely executive authority or ministerial positions: *In re Hennan*, 38 U.S. 230 (1839) (court clerk); *Shurtleff v. United States*, 189 U.S. 311 (1903) (general appraiser of merchandise); *Myers v. United States*, 272 U.S. 52 (1926) (station postmaster); *National Treasury Employees Union v. Reagan*, 663 F.2d 239 (D.C. Cir. 1981) (20,000 appointees to various federal jobs). Only in *Reagan v. United States*, 182 U.S. 419 (1901), did the Supreme Court ever uphold removal at will for an official exercising quasi-judicial authority. In *Reagan*, the Commissioner for the Indian Territory, Southern District, exercised powers of state justices of the peace. The Commissioner's dismissal was upheld pursuant to the general rule that "the power of removal is incident

to the power of appointment," *id.* at 424, citing *In re Hennan. In re Hennan*, however, recognized three exceptions to this general rule: where "a different tenure is expressed in the appointment, or is implied by the nature of the office, or results from ancient usage." *In re Hennan, supra* at 259.

At oral argument, defendants asserted that the Board has no "independent significance" because the Courts of Appeals and the Supreme Court review Board decisions using the same legal standards as the Board. Further, they argue that Congress could have assigned the functions performed by the Board to the Secretary. The Court finds these arguments unpersuasive. Regardless of the "significance" of the Board, Congress has established it. The nature of the Board's duties requires independence from the Secretary. The Board is analogous to the positions of Federal Trade Commissioner in *Humphrey's Executor v. United States, supra*, and War Claims Commissioner in *Wiener v. United States, supra*. The nature of the Board's duties requires independence from the Secretary. Congress did not assign the functions of the Board to the Secretary, and the Court need not decide whether Congress could constitutionally do so.

Article III of the Constitution permits Congress to establish courts inferior to the Supreme Court. Judges of Article III courts enjoy tenure during "good behavior." The Court rejects plaintiffs' argument that the Board is an Article III court. Congress expresses clearly which courts enjoy Article III status. *See, e.g.*, 28 U.S.C. § 171 (establishing the Court of Claims as an Article III court); 28 U.S.C. § 211 (accord, Court of Customs and Patent Appeals); 28 U.S.C. § 251 (accord, Customs Court). Congress has not done so here.

The due process clause of the Fifth Amendment to the Constitution provides that no person shall be deprived of life, liberty or property without due process of law.

Since the Court holds plaintiffs' removal by the Secretary at will is impermissible, plaintiffs enjoy a property interest in their positions within the meaning of the due process clause. *See Board of Regents v. Roth*, 408 U.S. 564, 577 (1972); *Perry v. Sindermann*, 408 U.S. 593, 601 (1972). Consequently, the Secretary's attempted dismissal without notice or opportunity for hearing violates plaintiffs' rights to due process of law under the Fifth Amendment.

An appropriate order accompanies this memorandum opinion.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

June 2, 1982

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action Nos. 82-1278
82-1406

IN RE BENEFITS REVIEW BOARD LITIGATION,
JUDGES KALARIS and MILLER

[Filed June 2, 1982]

ORDER AND JUDGMENT

Upon consideration of plaintiffs' motion for summary judgment; defendants' opposition and motion to dismiss, or in the alternative, for summary judgment; plaintiffs' opposition; the entire record; and after oral argument on June 1, 1982, for the reasons expressed in the accompanying memorandum opinion, it is by this Court this 2nd day of June 1982,

ORDERED that plaintiffs' motion for summary judgment is granted; it is further

ORDERED that defendants' motion to dismiss, or in the alternative, for summary judgment, is denied; it is further

ORDERED that defendants' action purporting to remove plaintiffs from the Benefits Review Board without cause is null and void and without legal effect; it is further

ORDERED that defendants, their officers, agents, employees and attorneys are permanently enjoined from removing or attempting to remove plaintiffs from the Benefits Review Board without showing cause and providing plaintiffs an opportunity to respond thereto and to be heard; and it is further

ORDERED that judgment is entered for plaintiffs and this action is dismissed.

/s/ June L. Green
JUNE L. GREEN
U.S. District Judge

APPENDIX C

Judgment of United States Court of Appeals for the District of Columbia Circuit and Orders Denying Rehearing and Suggestion for Rehearing En Banc

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UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

Civil Action Nos. 82-01278 and 82-01406

No. 82-1631

ISMENE M. KALARIS, Administrative Appeals Judge

v.

RAYMOND J. DONOVAN, Secretary of Labor, *et al.*,
Appellants

82-1633

JULIUS MILLER, Administrative Appeals Judge

v.

RAYMOND J. DONOVAN, Secretary of Labor, *et al.*,
Appellants

82-1694

JULIUS MILLER, Administrative Appeals Judge,
Appellant

v.

RAYMOND J. DONOVAN, Secretary of Labor, *et al.*,

82-1707

ISMENE M. KALARIS, Administrative Appeals Judge,
Appellant

v.

RAYMOND J. DONOVAN, Secretary of Labor, *et al.*

Appeals from the United States District Court
for the District of Columbia

Before: WRIGHT, TAMM and WALD, *Circuit Judges.*

JUDGMENT

These causes came on to be heard on the records on appeal from the United States District Court for the District of Columbia, and were argued by counsel. On consideration of the foregoing, it is

ORDERED and ADJUDGED, by this Court, that the judgment of the District Court from which these appeals have been taken is hereby affirmed in part, and reversed in part, in accordance with the opinion of this Court filed herein this date.

Per Curiam
For the Court

/s/ George A. Fisher
GEORGE A. FISHER
Clerk

Date: January 4, 1983.

Opinion for the Court filed by Circuit Judge Wright.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

Civil Action No. 82-01278

No. 82-1631

ISMENE M. KALARIS, Administrator Appeals Judge

v.

RAYMOND J. DONOVAN, Secretary of Labor, *et al.*,
Appellants

And consolidated cases

Argued 1-5-83

[Filed Mar. 7, 1983]

Before: WRIGHT, TAMM and WALD, *Circuit Judges.*

ORDER

On consideration of appellee's petition for rehearing, filed February 18, 1983, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

September Term, 1982

Civil Action No. 82-01278

No. 82-1631

ISMENE M. KALARIS, Administrator Appeals Judge

v.

RAYMOND J. DONOVAN, Secretary of Labor, *et al.*,
Appellants

And consolidated cases

Argued 1-4-83

[Filed Mar. 7, 1983]

Before: ROBINSON, *Chief Judge*, WRIGHT, TAMM, MACKINNON, WILKEY, WALD, MIKVA, EDWARDS, GINSBURG, BORK and SCALIA, *Circuit Judges*

ORDER

Appellee's suggestion for rehearing *en banc* has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration thereof, it is

ORDERED by the Court *en banc* that the aforesaid suggestion is denied.

Per Curiam

FOR THE COURT:

GEORGE A. FISHER
Clerk

BY: /s/ Robert A. Bonner
ROBERT A. BONNER
Chief Deputy Clerk

APPENDIX D

Constitutional Provisions, Statutes and Regulations Involved

Constitutional Provisions

ARTICLE III

Section 1. The judicial Power of the United States, shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish. The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behavior, and shall, at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under the Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

AMENDMENT V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be

subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

***Statutes*—Title 33, United States Code (1976 and Supp. IV)**

§ 921. Review of compensation orders

(a) Effectiveness and finality of orders

A compensation order shall become effective when filed in the office of the deputy commissioner as provided in section 919 of this title, and, unless proceedings for the suspension or setting aside of such order are instituted as provided in subdivision (b) of this section, shall become final at the expiration of the thirtieth day thereafter.

(b) Benefits Review Board; establishment; members; chairman; quorum; voting; questions reviewable; record; conclusiveness of findings; stay of payments; remand

(1) There is hereby established a Benefits Review Board which shall be composed of three members appointed by the Secretary from among individuals who are especially qualified to serve on such Board. The Secretary shall designate one of the members of the Board to serve as chairman.

(2) For the purpose of carrying out its functions under this chapter, two members of the Board shall constitute a quorum and official action can be taken only on the affirmative vote of at least two members.

(3) The Board shall be authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter and the extensions thereof. The Board's orders shall be based upon the hearing record. The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole. The payment of the amounts required by an award shall not be stayed pending final decision in any proceeding unless ordered by the Board. No stay shall be

issued unless irreparable injury would otherwise ensue to the employer or carrier.

(4) The Board may, on its own motion or at the request of the Secretary, remand a case to the administrative law judge for further appropriate action. The consent of the parties in interest shall not be a prerequisite to a remand by the Board.

(c) Court of appeals; jurisdiction; persons entitled to review; petition; record; determination and enforcement; service of process; stay of payments

Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States court of appeals for the circuit in which the injury occurred, by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of title 28. Upon such filing, the court shall have jurisdiction of the proceeding and shall have the power to give a decree after affirming, modifying, or setting aside, in whole or in part, the order of the Board and enforcing same to the extent that such order is affirmed or modified. The orders, writs, and processes of the court in such proceedings may run, be served, and be returnable anywhere in the United States. The payment of the amounts required by an award shall not be stayed pending final decision in any such proceeding unless ordered by the court. No stay shall be issued unless irreparable injury would otherwise ensue to the employer or carrier. The order of the court allowing any stay shall contain a specific finding, based upon evidence submitted to the court and identified by reference thereto, that irreparable damage would result to the employer, and specifying the nature of the damage.

(d) District court; jurisdiction; enforcement of orders; application of beneficiaries of awards or deputy commissioner; process for compliance with orders

If any employer or his officers or agents fails to comply with a compensation order making an award, that has become final, any beneficiary of such award or the deputy commissioner making the order, may apply for the enforcement of the order to the Federal district court for the judicial district in which the injury occurred (or to the United States District Court for the District of Columbia if the injury occurred in the District). If the court determines that the order was made and served in accordance with law, and that such employer or his officers or agents have failed to comply therewith, the court shall enforce obedience to the order by writ of injunction or by other proper process, mandatory or otherwise, to enjoin upon such person and his officers and agents compliance with the order.

(e) Institution of proceedings for suspension, setting aside, or enforcement of compensation orders

Proceedings for suspending, setting aside, or enforcing a compensation order, whether rejecting a claim or making an award, shall not be instituted otherwise than as provided in this section and section 918 of this title.

(Mar. 4, 1927, ch. 509, § 21, 44 Stat. 1436; June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Oct. 27, 1972, Pub. L. 92-576, § 15(a), (b), 86 Stat. 1261, 1262.)

§ 939. Administration by Secretary

(a) Prescribing rules and regulations; appointing and fixing compensation of employees; making expenditures

Except as otherwise specifically provided, the Secretary shall administer the provisions of this chapter, and for

such purpose the Secretary is authorized (1) to make such rules and regulations; (2) to appoint and fix the compensation of such temporary technical assistants and medical advisers, and subject to the provisions of the civil service laws, to appoint, and, in accordance with chapter 51 and subchapter III of chapter 53 of title 5, to fix the compensation of such deputy commissioners (except deputy commissioners appointed under subdivision (a) of section 940 of this title) and other officers and employees; and (3) to make such expenditures (including expenditures for personal services and rent at the seat of government and elsewhere, for law books, books of reference, periodicals, and for printing and binding) as may be necessary in the administration of this chapter. All expenditures of the Secretary in the administration of this chaper shall be allowed and paid as provided in section 945 of this title upon the presentation of itemized vouchers therefor approved by the Secretary.

(b) Establishing compensation districts

The Secretary shall establish compensation districts, to include the high seas and the areas within the United States to which this chapter applies, and shall assign to each such district one or more deputy commissioners, as the Secretary deems advisable. Judicial proceedings under sections 918 and 921 of this title in respect of any injury or death occurring on the high seas shall be instituted in the district court within whose territorial jurisdiction is located the office of the deputy commissioner having jurisdiction in respect of such injury or death (or in the United States District Court for the District of Columbia if such office is located in such District).

(c) Furnishing information and assistance; directing vocational rehabilitation

(1) The Secretary shall, upon request, provide persons covered by this chapter with information and assistance relating to the chapter's coverage and compensation and the procedures for obtaining such compensation

and including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such services available.

(2) The Secretary shall direct the vocational rehabilitation of permanently disabled employees and shall arrange with the appropriate public or private agencies in States or Territories, possessions, or the District of Columbia for such rehabilitation. The Secretary may in his discretion furnish such prosthetic appliances or other apparatus made necessary by an injury upon which an award has been made under this chapter to render a disabled employee fit to engage in a remunerative occupation. Where necessary rehabilitation services are not available otherwise, the Secretary of Labor may in his discretion, use the fund provided for in section 944 of this title in such amounts as may be necessary to procure such services, including necessary prosthetic appliance or other apparatus. This fund shall also be available in such amounts as may be authorized in annual appropriations for the Department of Labor for the costs of administering this subsection.

(Mar. 4, 1927, ch. 509, § 39, 44 Stat. 1442; June 25, 1936, ch. 804, 49 Stat. 1921; June 25, 1948, ch. 646, § 32(b), 62 Stat. 991; May 24, 1949, ch. 139, § 127, 63 Stat. 107; Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972; July 26, 1956, ch. 735, § 7, 70 Stat. 656; Oct. 27, 1972, Pub. L. 92-576, § 17, 86 Stat. 1262.)

§ 940. Deputy commissioners

(a) Appointment; use of personnel and facilities of boards, commissions, or other agencies; expenses and salaries

The Secretary may appoint as deputy commissioners any member of any board, commission, or other agency of

a State to act as deputy commissioner for any compensation district or part thereof in such State, and may make arrangements with such board, commission, or other agency for the use of the personnel and facilities thereof in the administration of this chapter. The Secretary may make such arrangements as may be deemed advisable by him for the payment of expenses of such board, commission, or other agency, incurred in the administration of this chapter pursuant to this section, and for the payment of salaries to such board, commission, or other agency, or the members thereof, and may pay any amounts agreed upon to the proper officers of the State, upon vouchers approved by the Secretary.

(b) Appointment in Territories and District of Columbia; compensation

In any Territory of the United States or in the District of Columbia a person holding an office under the United States may be appointed deputy commissioner and for services rendered as deputy commissioner may be paid compensation, in addition to that he is receiving from the United States, in an amount fixed by the Secretary in accordance with chapter 51 and subchapter III of chapter 53 of title 5.

(c) Transfers to other districts; temporary details

Deputy commissioner (except deputy commissioners appointed under subdivision (a) of this section) may be transferred from one compensation district to another and may be temporarily detailed from one compensation district for service in another in the discretion of the Secretary.

(d) Maintaining offices

Each deputy commissioner shall maintain and keep open during reasonable business hours an office, at a place designated by the Secretary, for the transaction of business under this chapter, at which office he shall keep his

official records and papers. Such office shall be furnished and and equipped by the Secretary, who shall also furnish the deputy commissioner with all necessary clerical and other assistants, records, books, blanks, and supplies. Wherever practicable such office shall be located in a building owned or leased by the United States; otherwise the Secretary shall rent suitable quarters.

(e) Records and papers

If any deputy commissioner is removed from office, or for any reason ceases to act as such deputy commissioner, all of his official records and papers and office equipment shall be transferred to his successor in office or, if there be no successor, then to the Secretary or to a deputy commissioner designated by the Secretary.

(f) Conflict of interest

Neither a deputy commissioner or Board member nor any business associate of a deputy commissioner or Board member shall appear as attorney in any proceeding under this chapter, and no deputy commissioner or Board member shall act in any such case in which he is interested or when he is employed by any party in interest or related to any party in interest by consanguinity or affinity within the third degree, as determined by the common law.

(Mar. 4, 1927, ch. 509, § 40, 44 Stat. 1443; Oct. 28, 1949, ch. 782, title XI, § 1106(a), 63 Stat. 972; Oct. 27, 1972, Pub. L. 92-576, § 15(j), 86 Stat. 1262).

* * * *

§ 801.103 Organizational placement.

As prescribed by the statute, the functions of the Benefits Review Board are quasi-judicial in nature and involve review of decisions made in the course of the administration of the above statutes by the Employment Standards Administration in the Department of Labor. It is accordingly found appropriate for organizational purposes to place the Board in the Office of the Under Secretary and it is hereby established in that Office, which shall be responsible for providing necessary funds, personnel, supplies, equipment, and records services for the Board.

§ 801.104 Operational rules.

The Under Secretary may promulgate such rules and regulations as may be necessary or appropriate for effective operation of the Benefits Review Board as an independent quasi-judicial body in accordance with the provisions of the statute.

MEMBERS OF THE BOARD

§ 801.201 Composition of the Board.

(a) The Board is composed of three members appointed by the Secretary from among individuals who are especially qualified to serve thereon.

(b) The member designated by the Secretary as Chairman of the Board shall serve as chief administrative officer of the Board.

(c) The two remaining members shall be the associate members of the Board.

(d) All members of the Board shall serve indefinite terms to be determined in the discretion of the Secretary.

APPENDIX E

Excerpts from Department of Labor position description for Member (Administrative Appeals Judge), Benefits Review Board

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I. INTRODUCTION

The Benefits Review Board (hereinafter, the Board) is a three member independent body which was created by Congress as a part of comprehensive changes made in the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972. The Board by statute exercises similar judicial appellate review authority to that formerly vested in the various United States District Courts throughout the United States in Longshoremen's and Harbor Workers' Compensation Act cases, (hereinafter, Longshore) and extensions thereof to include the Defense Base Act, the District of Columbia Workmen's Compensation Act, the Outer Continental Shelf Lands Act and the Non-Appropriated Fund Instrumentalities Act. Additionally, the Board's jurisdiction also includes the consideration of appeals arising under the Federal Coal Mine Health and Safety Act of 1969, as amended by the Black Lung Benefits Act of 1972, and the Black Lung Benefits Reform Act of 1977, which incorporates by reference the procedural provisions of the Longshore Act, as amended in 1972. Thus, the Board exercises similar judicial appellate review authority to that formerly vested in the various United States District Courts throughout the United States in Black Lung cases. Members of the Board are appointed by the Secretary of Labor.

The jurisdiction of the Board in Longshore and Black Lung cases involves deciding all substantial questions of fact as well as law from decisions of Administrative Law Judges, including questions raising constitutional issues. The Board has the authority to affirm, reverse, modify and

to remand on its own motion decisions of Administrative Law Judges (hereinafter, ALJ) and Deputy Commissioners appealed by any party in interest. The Board in its discretion may also approve agreed settlements between parties in cases on appeal before the Board. The Board does not review appealed cases de novo, nor does the Board accept additional evidence, but like the United States District Courts and Courts of Appeals, reviews the cases based solely on the record made before the ALJ's. The Board has the exclusive jurisdiction to hear and decide appeals involving discretionary acts of Deputy Commissioners which cannot be entertained by Administrative Law Judges. The only appeal from the Board's decisions is to the United States Courts of Appeals which are but one step below the United States Supreme Court. The Board resolves questions of law; interprets statutes, regulations and legislative history; and harmonizes prior court opinion with statutory provisions. The Board's decisions have the force and effect of law. Incumbents serve as Members of the Board and as such are Administrative Appeals Judges of the Department of Labor.

II. PRINCIPAL DUTIES AND RESPONSIBILITIES

The two Incumbents exercise completely independent judgment in discharging their duties and responsibilities as required by law and any applicable regulations.

* * * *

In exercising completely independent judgment, Incumbents shall sign any decision with which they agree or shall take such action as they may deem appropriate, including that of writing concurring and/or dissenting opinions.

Cases appealed to the Board from decisions of Administrative Law Judges and Deputy Commissioners in Longshore and Black Lung cases involve a broad range of legal, medical, economic and technical issues which affect the entire maritime and coal mining industries. Specifically these

cases affect among others hundreds of thousands of maritime and coal mining workers and their respective labor unions, as well as coal mining companies, coal processing companies, coal transportation companies, stevedoring companies, shipbuilding companies, ship repair companies and other employers who are involved in harbor construction and repairs, and their respective insurance carriers. The Longshore and Black Lung statutes under which the Board is charged are national and in some instances international in scope. The benefits sought are not governmental benefits, but are private benefits with substantial financial impact on private industry and the claimants to the extent that often time an award for permanent total disability benefits can exceed $500,000. Authority to grant a stay of payments of an award made by an Administrative Law Judge is delegated to the Board by statute.

* * * *

Incumbents participate at formal transcribed hearings held by the Board for the purposes of hearing oral arguments in cases where the Board either on its own motion, or motion of counsel, has agreed to hear such arguments and in all matters properly arising therein. Oral arguments are held in cities throughout the United States, which are convenient to the parties.

Incumbents along with the Board Chairman pursuant to a proper motion and fee petition, establish and set the attorney fee for claimant's counsel to be paid by the employer and/or carrier in cases where claimant's counsel is entitled to such fee.

III. SUPERVISION AND GUIDANCE RECEIVED

Incumbents, being completely independent, receive very general administrative guidance from the Board Chairman, for non-judicial matters only.

IV. OTHER SIGNIFICANT FACTS

The position requires exceptional ability to appraise, evaluate, and adjudge exceptionally difficult issues, and ability to grasp the fundamentals of complex technical subject matter. It is essential that the highest standards of judiciousness, objectivity, and equanimity be exercised at Board hearings and in arriving at decisions.

Incumbents should be attorneys who possess in depth legal knowledge and experience in judicial procedures and practice. Incumbents must also have the ability to write clear and concise legal decisions and orders. Incumbents at all times must have the ability to conduct themselves in a dignified, orderly and impartial manner.

APPENDIX F

Excerpt from brief submitted by Secretary of Labor to the United States Court of Appeals for the Ninth Circuit in *Boating Industries Ass'ns v. Marshall*, 601 F.2d 1376 (9th Cir. 1979)

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 78-1827

BOATING INDUSTRY ASSOCIATIONS, *et al.*,
Plaintiffs-Appellees

v.

F. RAY MARSHALL, Secretary of Labor, *et al.*,
Defendants-Appellants

On Appeal from the United States District Court
for the Northern District of California
(Robert H. Schnacke, Judge)

BRIEF FOR DEFENDANTS-APPELLANTS

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II

THE ADMINISTRATORS' MERE ADVICE AND STATEMENT OF POSITION ON A QUESTION WITHIN THE ADMINISTRATIVE DECISIONAL AUTHORITY OF THE INDEPENDENT ADMINISTRATIVE LAW JUDGES AND BENEFITS REVIEW BOARD GIVES RISE TO NO PRESENT JUSTICIABLE CONTROVERSY.

A. *The Administrative Structure*

The Longshoremen's Act is, for the most part, a typical workers' compensation statute, fully comparable to those of the states. If an employer does not institute periodic payments of compensation after an injury (or death) without the need for any proceedings,[8] the injured worker (or the surviving family) files a claim[9] with the local district office of the Office of Workers' Compensation Programs, Employment Standards Administration, U.S. Department of Labor.[10] In the event the efforts of the district office to bring the dispute between the claimant and the employer and its insurance carrier to an amicable (or at least agreed) resolution prove unsuccessful, the case is referred by that office to the Department of Labor's Office of Administrative Law Judges for a formal hearing and decision of the disputed questions of law, fact, or both, and issuance of a "compensation order"

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[8] Longshoremen's Act § 14, 33 U.S.C. § 914.

[9] Longshoremen's Act § 13, as amended, 33 U.S.C. § 913 (1970 & Supp. V, 1975).

[10] The Office of Workers' Compensation Programs district offices are headed by "deputy commissioners" appointed under Longshoremen's Act § 40, 33 U.S.C. § 940, who are subordinates of the Director, Office of Workers' Compensation Programs. *See generally* 20 CFR § 701.203; Longshoremen's Act §§ 39(b), 40, 33 U.S.C. §§ 939(b), 940.

making an award or denying the claim.[11] The administrative law judges who make those decisions, although within the Department of Labor for "housekeeping" purposes, are entirely independent of the responsible "program officials," such as the defendants-appellants, including the Secretary of Labor. The Director, Office of Workers' Compensation Programs, as the delegate of the Assistant Secretary, who is in turn the delegate of the Secretary, for the administration and enforcement of the Longshoremen's Act, appears as a party before the Office of Administrative Law Judges just like the private parties.[12]

Any party—including the Director [13]—dissatisfied with an administrative law judge's decision may appeal to the Benefits Review Board.[14] The Board is statutorily created, and although it too is housed within the Department of Labor, it is not subject to direction, or review by the Director, the Assistant Secretary, or the Secretary; its nature as exclusively an "independent quasi-judicial" appellate-review tribunal is recognized and respected.[15] The Board has frequently rejected the Secretary's position, as presented on behalf of the Director, who generally participates (through counsel) in Benefits Review Board proceedings on legal issues of program significance under the Act. And the Director, on behalf of the Secretary,[16] has

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[11] Longshoremen's Act § 19(d), (e), as amended, 33 U.S.C. § 919(d) (Supp. V, 1975), (e) (1970). *See* 20 C.F.R. §§ 702.201-.350 (1977).

[12] *See* 20 CFR §§ 701.201-.203; § 702.333(b). *See also* Longshoremen's Act § 39, as amended, 33 U.S.C. § 939 (1970 & Supp. V, 1975).

[13] 20 CFR § 801.2(10); *see United Brands Co.* v. *Melson*, 569 F.2d 214, 217 (5th Cir. 1978).

[14] Longshoremen's Act § 21(b), as amended, 33 U.S.C. § 921(b) (Supp. V, 1975).

[15] 20 CFR § 801.104. *Cf. id.* § 801.103.

[16] 20 CFR § 802.410(b).

frequently sought judicial review of such decisions of the Board.[17]

It is a peculiarity of this administrative system for the resolution of claims that the decision that is subject to judicial review in the statutorily specified manner and court—that of the Board—is not the decision of, or subject to review by, the Secretary or any of his subordinates, who are otherwise responsible for the general administration and implementation of the Act. Further, the Secretary's direct authority to *enforce* the provisions of the Act is quite limited. He cannot, of course, institute criminal proceedings where he believes the provisions of the Act carrying criminal penalties for failure of compliance[18] have been violated; he can do no more than recommend or request that a United States district attorney do so. Nor can he or his subordinates institute compensation proceedings leading to a compensation order on their own; there must be some assertion of (or inquiry concerning) entitlement under the Act by the person entitled to compensation before the administrative officials can take action to determine the employer's liability, and, again, even then the administrators' action, if the employer persists in its denial of liability, is limited to referral of the case to the independent adjudicatory

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[17] *E.g., Director, OWCP* v. *Rasmussen*, 567 F.2d 1385 (9th Cir. 1978), *cert. granted*, 98 S.Ct. ——, 46 U.S.L.W. 3765 (U.S. June 12, 1978) (No. 77-1465); *Director, OWCP* v. *O'Keefe*, 545 F.2d 337 (3d Cir. 1976). *See Director, OWCP* v. *Eastern Coal Corp.*, 561 F.2d 632 (6th Cir. 1977). *Cf. Director, OWCP* v. *Jacksonville Shipyard, Inc.*, 433 U.S. 904 (1977), *vacating and remanding in part Jacksonville Shipyards, Inc.* v. *Perdue*, 539 F.2d 533 (5th Cir. 1976).

[18] See particularly Longshoremen's Act § 38, 33 U.S.C. § 938, to which the district court referred (R. 392), which provides criminal penalties for failure to comply with § 32 of the Act, 33 U.S.C. § 932, which requires an "employer" (*see* § 2(4), as amended, 33 U.S.C. § 902(4) (Supp. V, 1975)) to carry insurance or to qualify as a self-insurer for its potential liability under the Act.

tribunals and presentation to those tribunals of legal argument in support of the administrative position.[19] The administrators' direct enforcement authority is limited to cases in which a compensation order has been entered and has become final.[20]

* * * *

[19] *See also* Longshoremen's Act § 39(c), as amended, 33 U.S.C. § 939(c) (Supp. V, 1975).

[20] Longshoremen's Act § 21(d), as amended, 33 U.S.C. § 921(d) (Supp. V, 1975). *See Marshall* v. *Barnes & Tucker Co.*, 432 F. Supp. 935 (W.D. Pa. 1977).

No. 82-1686

In the Supreme Court of the United States

OCTOBER TERM, 1982

ISMENE M. KALARIS, ADMINISTRATIVE APPEALS JUDGE, ET AL., PETITIONERS

v.

RAYMOND J. DONOVAN, SECRETARY OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the members of the Benefits Review Board of the Department of Labor, who are appointed by the Secretary of Labor pursuant to a statute that contains no provisions regarding their tenure, may be removed by the Secretary.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-48a) is reported at 697 F.2d 376. The opinion of the district court (Pet. App. 49a-56a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1983. A petition for rehearing was denied on March 7, 1983. The petition for a writ

of certiorari was filed on April 15, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioners are members of the Benefits Review Board of the Department of Labor. The Board is a three-person body that hears appeals from administrative law judge (ALJ) decisions on claims for workers' compensation under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), 33 U.S.C. 901 *et seq.*, and other statutes (see Pet. App 6a n.13). The Benefits Review Board was established by the 1972 Amendments to the LHWCA (Pub. L. No. 92-576, Section 15, 86 Stat. 1261) and was intended by Congress "to provide an internal administrative review of initial decisions in contested cases * * * within the Department of Labor." S. Rep. No. 92-1125, 92d Cong., 2d Sess. 14 (1972). The workers' compensation claimant and the employer are normally the adverse parties before the Board. The Director of the Office of Workers' Compensation Programs (OWCP)—the Department of Labor official to whom the Secretary has delegated responsibility for administering the LHWCA—also may participate in proceedings before the ALJ and the Board. 20 C.F.R. 701.201, 702.333, 801.2(10), 802.201(b). The Board cannot enforce its own orders; a party seeking enforcement of an order must apply to the appropriate United States district court. 33 U.S.C. 921(d).

The Board reviews ALJ decisions on the record, without receiving new evidence, and must uphold an ALJ's factual determination if it is supported by substantial evidence. 33 U.S.C. 921(b); 20 C.F.R. 802.301. The Board's decisions are reviewable in the

appropriate court of appeals (33 U.S.C. 921(c)). On review, the court of appeals duplicates the Board's inquiry: it determines whether the ALJ's conclusions of law are correct and whether there is substantial evidence supporting the ALJ's factual findings. See Pet. App. 8a, 16a-17a; H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 12 (1972); *Duncanson-Harrelson Co.* v. *Director, OWCP*, 686 F.2d 1336, 1338-1339 (9th Cir. 1982); petition for cert. pending, No. 82-1113; *Presley* v. *Tinsley Maintenance Service*, 529 F.2d 433, 436 (5th Cir. 1976); *Potenza* v. *United Terminals, Inc.*, 524 F.2d 1136, 1137 (2d Cir. 1975).

Under the 1972 Amendments, the Secretary of Labor appoints the members of the Board. 33 U.S.C. 921(b)(1). But the Act does not specify a term for the appointees, nor does it address the circumstances under which they may be removed. In his initial regulations constituting the Board, issued in 1973, the Secretary specified that "[a]ll members of the Board shall serve indefinite terms to be determined in the discretion of the Secretary." 20 C.F.R. 801.201(d).

2. In April 1982, petitioners were informed that they were being removed from the Board and transferred to positions at like grade and salary in the Office of the Solicitor of the Department of Labor. Pet. App. 8a, 9a n.23. Petitioners then brought this action in the United States District Court for the District of Columbia, seeking to enjoin their transfer. They contended both that Congress had not intended the Secretary to have the power to remove them at his discretion and that they were Article III judges with life tenure. The district court enjoined the Secretary from transferring petitioners, reasoning that "[t]he Secretary's interpretation [of the

LHWCA] would permit him to influence claims decisions outside the adjudicatory process through replacement of the entire Board" and that such an interpretation would render the Act unconstitutional as a violation of separation of powers principles. *Id.* at 51a. The district court rejected petitioners' argument that they are Article III judges. *Id.* at 53a.

The court of appeals reversed, stating that it would "hold to the long-standing rule that in the face of congressional silence all inferior officers of the United States serve at the discretion of their appointing officer." Pet. App. 3a-4a. The court of appeals further concluded that "[a]ll of the available evidence indicates that Congress intended to allow the Secretary to remove these Board members in his discretion, and nothing in Article III, separation of powers principles, or the decisions of the Supreme Court prevents Congress from doing so" (*id.* at 48a). The court of appeals agreed with the district court that petitioners are not Article III judges (*id.* at 10a-21a), but it rejected the district court's suggestion that the Secretary's power to remove Board members raised other constitutional questions (*id.* at 38a-47a). The court of appeals noted that while the Board could be described as a quasi-judicial body, "this general characterization does little to distinguish the Board, constitutionally, from the scores of administrative boards and tribunals in the Executive Branch that currently adjudicate claims to federal statutory rights" and that "[m]any statutes directly grant the Executive power to remove officials performing quasi-judicial tasks. * * * Congress has been creating quasi-judicial boards subject to Executive control for years, and the courts have not previously prevented it from doing so." *Id.* at 44a-47a (footnotes omitted).

ARGUMENT

1. a. Petitioners' principal contention (Pet. 8, 11-20) is that the LHWCA prohibits their removal by the Secretary. But the LHWCA is silent on the tenure of Board members, and the established rule of statutory construction is that when an Act of Congress creating an office is silent on the appointee's tenure, the appointee serves at the pleasure of the appointing officer. See, *e.g.*, *Shurtleff* v. *United States*, 189 U.S. 311, 318 (1903); *Reagan* v. *United States*, 182 U.S. 419 (1901); *In re Hennen*, 38 U.S. (13 Pet.) 230, 258-259 (1839). See also *Cafeteria & Restaurant Workers Local 473* v. *McElroy*, 367 U.S. 886, 896 (1961) ("government employment, in the absence of legislation, can be revoked at the will of the appointing officer"); *DeCastro* v. *Board of Commissioners*, 322 U.S. 451, 462 (1944); *Arnett* v. *Kennedy*, 416 U.S. 134, 181 (1974) (opinion of White, J.).

The reason for this principle is that officials whose tenure is not specified must either serve at the pleasure of the appointing authority or hold office for life, and except for the constitutionally prescribed tenure of Article III judges, life tenure in an office is virtually unknown in the federal government. See *In re Hennen*, *supra*, 38 U.S. (13 Pet.) at 259 ("All offices, the tenure of which is not fixed by the constitution or limited by law, must be held either during good behavior, or (which is the same thing in contemplation of law), during the life of the incumbent; or must be held at the will and discretion of some department of the government, and subject to removal at pleasure."). As the Court explained in *Shurtleff* v. *United States*, *supra*, 189 U.S. at 318:

> We [cannot adopt a construction of a statute that] * * * results in the creation of a tenure

> of this particular office, not attached to a single other civil office in the government, with the exception of judges of the courts of the United States. We cannot bring ourselves to the belief that Congress ever intended this result while omitting to use language which would put that intention beyond doubt.

Petitioners' assertion (Pet. 12-15) that a different rule applies to "quasi-judicial" offices is without foundation. *Shurtleff* v. *United States*, *supra*, and *Reagan* v. *United States*, *supra*, the principal cases establishing the rule that an appointee whose tenure is unspecified serves at the pleasure of the appointing officer, involved quasi-judicial offices: a general appraiser of merchandise in *Shurtleff* and a commissioner of the Indian territory, an officer "who performed entirely judicial functions—like justices of the peace" (Pet. App. 36a), in *Reagan*.[1] Moreover, as the court of appeals pointed out (Pet. App. 44a-47a), Congress has created many quasi-judicial bodies whose members serve at the discretion of the executive branch officer who appoints them.

Petitioners rely (Pet. 11-15) on *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935), and *Wiener* v. *United States*, 357 U.S. 349 (1958). But both of those cases involved appointees whose terms were for a specified number of years; indeed, as the court of appeals noted, the Court in *Humphrey's Executor* "went to great lengths to limit its holding to cases where Congress had defined fixed terms for agency members" (Pet. App. 33a). The *Humphrey's Executor* Court, citing and describing the reasoning

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[1] Petitioners appear to concede (Pet. 13 n.26) that *Reagan* involved a quasi-judicial office; they ignore *Shurtleff*.

of *Shurtleff*, explained that in the absence of any provision respecting tenure, the Court would not assume that Congress intended to deny the appointing authority power to remove the appointee if such a conclusion "reasonably could be avoided." 295 U.S. at 623. The Court further explained that the situation in *Humphrey's Executor* itself was "plainly and wholly different" precisely because "the fixing of a definite term subject to removal for cause" ordinarily "establish[es] the legislative intent that the term is not to be curtailed in the absence of such cause." *Ibid.* *Wiener*, which involved an appointee to the War Claims Commission, explicitly followed *Humphrey's Executor* (see 357 U.S. at 352-353, 355-356), and began from the premise that "[i]n the present case, Congress provided for a tenure defined by the relatively short period of time during which the War Claims Commission was to operate—that is, it was to wind up not later than three years after the expiration of the time for filing of claims." *Id.* at 352.[2]

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[2] Petitioners also suggest (Pet. 14) that the functions of the War Claims Commission were so similar to those of the Benefits Review Board that Congress must have intended the removal power to be the same. But *Wiener* and *Humphrey's Executor* do not suggest that function alone is decisive. In any event, the Court pointed out in *Wiener* that a crucial aspect of the Commission's powers was that its decisions were final and nonreviewable (see 357 U.S. at 354-355); by contrast, the Board's decisions are reviewable by a court of appeals, which essentially duplicates the Board's inquiry.

While petitioners are of course correct in saying (Pet. 12-13) that *Humphrey's Executor* disapproved some of the dicta of *Myers* v. *United States*, 272 U.S. 52 (1926), those dicta concerned not the interpretation of statutes but the authority of Congress to limit the President's removal power (see 295 U.S. at 626-627)—something that is not at issue in this case.

b. As the court of appeals explained in detail (Pet. App. 23a-30a), specific indications of congressional intent reinforce the inference, created by the absence of any fixed term or provision for removal, that Congress intended Board members to serve at the pleasure of the Secretary. First, Congress appears to have specifically addressed the question of the Board's independence from the Secretary, and to have resolved it in a way that leaves no room for the conclusion that Congress intended to insulate Board members from removal by the Secretary. When Congress created the Board, it gave the "most careful consideration to the recommendations of the National Commission on State Workmen's Compensation laws contained in its report issued on July 31, 1972" (H.R. Rep. No. 92-1441, *supra*, at 2). That report recommended that members of appeals boards like the Benefits Review Board be appointed for fixed terms with protection against removal. The report also acknowledged that the interest in holding the executive branch "accountable for agency operations" militated against tenure with fixed terms. Pet. App. 23a & n.56. Thus, it is clear that Congress deliberately chose not to give Board members the kind of tenure that would protect them against removal by the Secretary.

Moreover, Congress did attempt to ensure a degree of independence for the Board; it instructed the Secretary "to keep separate the functions of administering the program and sitting in judgment on the hearings" (S. Rep. No. 92-1125, *supra*, at 13-14). But at the same time, Congress explicitly placed the Benefits Review Board "within the Department of Labor" (*id.* at 14); it is difficult to see why Congress would have placed the Board within the Department

if it wanted to insulate it totally from the Secretary, as petitioners suggest. In *Humphrey's Executor* and *Wiener*, when Congress intended to insulate an appointee from removal, it placed his office outside any executive department. Similarly, it is unlikely that Congress would have made an official with the extraordinary independence petitioners seek an "inferior Officer" appointed by the head of a department, instead of an "Officer[] of the United States," appointed by the President with the advice and consent of the Senate. See Art. II, § 2, Cl. 2. "It cannot, for a moment, be admitted, that it was the intention of the constitution, that those offices which are denominated inferior offices should be held during [good behavior]." *In re Hennen, supra*, 38 U.S. (13 Pet.) at 259.[3]

In addition, when Congress established the Board, it vested in the Secretary the duty of issuing regulations governing the Board's operations. The Secretary protected the Board's independence within the Department by giving supervisory responsibility to the Under Secretary of Labor rather than an Assistant Secretary; the Secretary explained that "the Board's functions are quasi-judicial in character and involve review of decisions made in the course of the administration of * * * several Acts by the Employment Standards Administration which is headed by an Assistant Secretary" (38 Fed. Reg. 6171 (1973)). As we have noted (see page 3, *supra*), however, the Secretary also issued a regulation providing that

[3] See also *United States* v. *Germaine*, 99 U.S. 508, 509-510 (1879), quoted in *Buckley* v. *Valeo*, 424 U.S. 1, 125 (1976) (the Constitution prescribes a different method of appointing inferior officers in order to facilitate "sudden removals" of such officers).

members of the Board "shall have indefinite terms to be determined in the discretion of the Secretary" (20 C.F.R. 801.201(d)). This regulation has remained in force since just after the Board was established. Indeed, it was repromulgated in 1978 with the express approval of the members of the Board—including petitioners. See 43 Fed. Reg. 42149; Pet. App. 26a & n.61. "[A]dministrative practice, consistent and generally unchallenged, will not be overturned except for very cogent reasons * * *. The practice has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with * * * setting its machinery in motion" (*Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315 (1933) (Cardozo, J.); see, *e.g.*, *Zenith Radio Corp.* v. *United States*, 437 U.S. 443, 450 (1978)).

Finally, in 1981, Congress considered a bill, S.1182, that would have removed the Board from the Department of Labor and made its members officers of the United States. Senator Nickles, who introduced S.1182 and who was chairman of the subcommittee charged with oversight of the LHWCA, explained that "[t]he 1972 amendments [to the LHWCA] * * * created a two-step administrative appeal process within the Department of Labor, including a Benefit Review Board whose three members are appointed by the Secretary of Labor *and serve at his pleasure*." 127 Cong. Rec. S5077 (daily ed. May 14, 1981) (emphasis added). In subsequent hearings, witnesses disagreed on the question whether and to what extent the Board should be independent of the Secretary, but agreed that, under the 1972 Amendments, the Board was not already independent. See *Longshoremen's and Harbor Workers' Compensation Act Amendments of 1981: Hearings Before the Subcomm. on Labor of the Senate*

Comm. on Labor and Human Resources, 97th Cong., 1st Sess. 219, 277, 524, 993, 1049, 1063, 1067, 1193-1197 (1981).[4] Although post-enactment events do not have the same weight in interpreting a statute as contemporary history, they may be considered in appropriate cases (see, *e.g.*, *North Haven Board of Education* v. *Bell*, 456 U.S. 512, 535 (1982)), and the history of S.1182 shows a clear congressional understanding that Board members serve at the pleasure of the Secretary. Petitioners fail to cite any evidence of a contrary understanding.

Petitioners instead suggest (Pet. 15-20) that there are countervailing indications of Congress's intent to deny the Secretary the power to remove Board members. The only indications of congressional intent that petitioners adduce are that the Director of OWCP, the Secretary's delegate, may appear before the Board, and that the Board's decisions are not subject to the Secretary's review. But the Director appears before the Board principally by virtue of the Secretary's own regulations, not because Congress has so provided (see 20 C.F.R. 801.2(10), 802.201(a), 802.410(b));[5] this aspect of the Board's procedures therefore reveals little about Congress's intent. And Congress's decision not to provide for the Secretary to review Board determinations *in particular cases* does not suggest that Congress was so concerned about

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[4] S.1182 was not enacted.

[5] See *Director, OWCP* v. *Perini North River Assoc.*, No. 81-897 (Jan. 11, 1983), slip op. 5 & n.10. Of the several workers' compensation statutes that authorize the Board to hear appeals, only the Black Lung Benefits Act of 1972 specifies that the Secretary's delegate may appear before the Board. See 30 U.S.C. (Supp. V) 932(k).

protecting Board members' independence that it took the extraordinary step of granting them life tenure.

2. Petitioners claim (Pet. 20-28) that if the LHWCA permits the Secretary to remove them from office, it violates Article III and the Due Process Clause.[6] These contentions do not warrant the Court's review for a number of reasons. As the court of appeals held (Pet. App. 42a n.91), petitioners lack standing to raise the due process claim, because *their* rights under the Due Process Clause are not jeopardized; their due process argument concerns only alleged unfairness to litigants before the Board, and such litigants are not parties here. See, *e.g.*, *Valley Forge Christian College* v. *Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 474 (1982), quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975) ("[T]he plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties."). We also note that petitioners did not raise their due process contention in the court of appeals. Pet. App. 42a n.91. As far as petitioners' Article III contention is concerned, even if petitioners were to prevail it is unclear that they could obtain the relief they seek. As the court of appeals noted, the proper remedy would be to "declare void the congressional authorization that allows the Secretary to determine the terms upon which Board members serve" because a court "cannot grant these Board members the terms they would prefer." *Id.* at 40a n.89. Thus, the only "remedy" available to peti-

[6] Petitioners also assert that the LHWCA would violate separation of powers principles, but the only separation of powers principles they invoke are those derived from Article III. See Pet. 21-23.

tioners would be the "abolition of the very offices the removed members seek to retain." *Ibid.*

Petitioners' constitutional claims are also without merit. Article III requires "that 'the essential attributes' of judicial power [be] retained in [an] Art. III court" (*Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, No. 81-150 (June 28, 1982), slip op. 30 (plurality opinion)), and an Article III court—a court of appeals—*duplicates* the functions of the Board. See page 3, *supra*. Therefore, Congress's decision not to constitute the Board as an Article III court did not divest Article III courts of *any* judicial power, much less "the essential attributes" of judicial power.

In any event, as the court of appeals noted, it is "obvious" (Pet. App. 40a n.89) that petitioners' Article III contention is foreclosed by *Crowell* v. *Benson*, 285 U.S. 22 (1932), which involved the same workers' compensation program that is at issue here. At the time of *Crowell*, the initial determination on a compensation claim was made by a deputy commissioner of the United States Employees' Compensation Commission. *Id.* at 43-44. That determination was reviewable in a United States district court and could be set aside for legal error or because the factual determinations were unsupported by substantial evidence. *Id.* at 46. This Court upheld the scheme after ascertaining that "constitutional" and "jurisdictional" facts were subject to de novo review by a court. *Id.* at 54-63; see *Northern Pipeline Construction Co.* v. *Marathon Pipe Line Co.*, *supra*, slip op. 32 n.34. The scheme challenged by petitioners differs from that upheld in *Crowell* in only three respects: the initial determination is made by an ALJ, not a deputy commissioner; the initial judicial review occurs in a court of appeals, not a district court; and

there is now an additional layer of administrative review—the Benefits Review Board. Article III cannot possibly be offended by any of these changes.

Petitioners urge (Pet. 22-23) that the "crucial" distinction between *Crowell* and this case is that the deputy commissioners who made the initial determination in *Crowell* were "*not* subordinates of the Executive Branch" but officials of "an independent agency" (Pet. 22; emphasis in original). Even assuming that this distinction is constitutionally significant for some purposes, it plainly cannot make any difference for Article III purposes. The deputy commissioners were indisputably not Article III judges but officials of "an administrative agency" (*Northern Pipe Line Construction Co.* v. *Marathon Pipe Line Co.*, *supra*, slip op. 27). That is, the deputy commissioners were no more Article III judges than the ALJs or the members of the Benefits Review Board are. If, as the court held in *Crowell*, Article III permits an adjudicative scheme in which deputy commissioners make the initial determinations, subject to "substantial evidence" review by an Article III court, then Article III must also permit the scheme challenged by petitioners.

Petitioners' due process contention (Pet. 23-25) consists of no more than an assertion that the Due Process Clause prohibits an agency from both adjudicating a claim and taking a position on how the claim should be resolved. This broad assertion, which would invalidate the practices of many administrative agencies, would be incorrect even if the same persons within the agency performed both functions. See, *e.g.*, *Withrow* v. *Larkin*, 421 U.S. 35, 46-58 (1975). Here, the Board and the OWCP, which appears before the Board, are distinct components of the Department of Labor; it is therefore entirely

clear that there is no constitutionally impermissible commingling of functions. See also 5 U.S.C. 554(d); *Marcello* v. *Bonds*, 349 U.S. 302, 311 (1955) (fact that Immigration and Naturalization Service special inquiry officer, who presided at deportation hearing, was subject to supervision and control by INS officials with investigatory and prosecutorial functions did not "strip[] the hearing of fairness and impartiality as to make the procedure violative of due process").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

This is Petitioners' reply to the Brief For The Respondents In Opposition to our petition for a writ of certiorari to review a judgment of the United States Court of Appeals for the District of Columbia Circuit upholding the power of the Secretary of Labor to remove, without cause, the judicial officers who compose the Benefits Review Board established by 33 U.S.C. § 921(b).[1]

We note first that the Secretary has generally failed to address the only question that is relevant at this stage:

[1] Our Petition is cited in this Reply Brief "Pet. ———"; Respondents' Brief in Opposition is cited "Resp. Bf. ——."

namely, whether the issues in this case deserve full review by this Court. *See* Sup. Ct. R. 17.1. Thus, the Secretary does not dispute our point (Pet. 7-10) that a decision by this Court in this case is necessary to help dispel the confusion that now exists below regarding the nature of the Board and its relationship to the Secretary. Instead, the Secretary simply argues the merits of his position. We respond briefly to those arguments in the balance of this brief.

1. The Secretary has misstated the principal question presented and the law that controls its disposition. The Secretary states the issue as being whether "members of the Benefits Review Board . . . may be removed by the Secretary." Resp. Bf. (i).[2] He next seeks to tag us with arguing that Congress created "life tenure in an office [that] is virtually unknown in the federal government" and meant to "insulate [the Board] . . . *totally* from the Secretary . . . ." *Id.* at 5, 9 (emphasis added).

Neither the statutory question we present nor our position on it is so broad.[3] This case involves a dismissal of the Board's judicial officers *without cause*. *See* Pet. (i) (Question 1), 5, 19 n.34.[4] We have shown that the

[2] Although he attaches no legal significance to the point, the Secretary notes that he proposes to transfer petitioners to positions of like grade and salary within the Department. Resp. Bf. 3. The record shows that this offer was not made until after this litigation began. Aff. of Ismene M. Kllaris ¶ 3, attached to Plaintiffs' Opposition to Motion for Immediate Issuance of Mandate, Jan. 24, 1983, D.C. Cir. Nos. 82-1631, etc.

[3] The Secretary understands that our principal contention rests on the Longshoremen's and Harbor Workers' Compensation Act (the "LHWCA"). Resp. Bf. 5. If the Court accepts our view of the LHWCA, we see no reason why, in this case, it need reach our separate Article III contention. Pet. 25-28.

[4] The Secretary has never contended that there is cause for Petitioners' removal. Nor did he promulgate regulations that would define tenure of Board members in some way that preserved the Board's independence.

Secretary's claim to such sweeping power cannot be squared with Congress' intent—and, we think, obligation —to constitute this Board as an independent adjudicative body. Pet. 11-25. But we emphasized that "it is *not* our position that the LHWCA protects Petitioners from removal even *with* cause." *Id.* at 19 n.34 (first emphasis added). We added that our position on the LHWCA goes no farther than to deny to the Secretary a removal power, such as the one he asserts here, that destroys the Board's independence. *Id.*

We do not argue, then, that the LHWCA places the Board totally beyond the Secretary's reach, precludes him from discharging his executive responsibilities under the LHWCA, or otherwise creates for the Board's members a tenure "virtually unknown in the federal government" (Resp. Bf. 5), one "'not attached to a single other civil office in the government . . . .'" *Id.* at 5-6, *quoting Shurtleff* v. *United States*, 189 U.S. 311, 318 (1903). Contrary to the Secretary's suggestion (Resp. Bf. 9), there is nothing "extraordinary" today about the protection the LHWCA affords Petitioners. Unlike generations ago, when the cases the Secretary relies on were decided,[5] civil officers in government today enjoy numerous statutory protections against arbitrary adverse per-

[5] The Secretary relies principally on Shurtleff v. United States, 189 U.S. 311 (1903), Reagan v. United States, 182 U.S. 419 (1901), and *In re* Hennan, 38 U.S. (13 Pet.) 230 (1839), all decided before passage of the Lloyd-La Follette Act (37 Stat. 539, 555 (1912)), in which Congress for the first time broadly protected the tenure of government employees in the civil service. *See* Arnett v. Kennedy, 416 U.S. 134, 148 (1974) (opinion of Rehnquist, J.).

In this connection, the Secretary brings us to task for having "ignore[d]" that *Shurtleff* involved removal of a quasi-judicial officer. Resp. Bf. at 6 n.1. If the general appraiser in *Shurtleff* was a purely adjudicatory officer as Board members are (Pet. 14), that fact does not appear in the *Shurtleff* opinion. In any event, like *Reagan*, *Shurtleff* is in the line of cases that culminated in Myers v. United States, 272 U.S. 52 (1926), the rule of which has since been confined to purely executive officers. *See* Pet. 11-13.

sonnel actions. In particular, administrative law judges (including, of course, those whose decisions the Board reviews) may not be removed from their jobs without cause. 5 U.S.C. § 7521. Petitioners claim no greater protection under the LHWCA than that enjoyed by the adjudicative officers whose decisions Petitioners review.

2. Having tortured the decisions in *Humphrey's Executor* v. *United States*, 295 U.S. 602 (1935) and *Wiener* v. *United States*, 357 U.S. 349 (1958) beyond recognition (*see* Resp. Bf. 6-7; Pet. 11-15),[6] the Secretary makes three points concerning the LHWCA. Resp. Bf. 8-12. Our Petition dealt with those points (Pet. 16-20), and we note here only the gap between fact and fancy in the Secretary's brief. Thus, the Secretary thinks that Congress' unexplained failure to adopt one of many recommendations in a 151-page report is evidence that Congress "specifically addressed" the matter of the Board's independence. Resp. Bf. 8; *see* Pet. 16 n.29. A single regulation, not invoked before this case, is made out to be a consistent administrative practice, despite all the contrary evidence regarding the Department's respect for, and even trumpeting of, the Board's independence. Resp. Bf. 10; *see* Pet. 4 & n.5, 17-18 and Appendices E & F. Statements of a single Senator (who was not a member

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[6] *Humphrey's Executor* and *Wiener* very clearly establish that there must be an explicit statutory basis to support the Executive's power to remove the judicial officers he appoints. Pet. 12-13. "[N]o such power is given to the President directly by the Constitution, and none is impliedly conferred upon him by statute simply because Congress said nothing about it." Wiener v. United States, 357 U.S. 349, 356 (1958).

The Secretary claims that application of this holding does not turn decisively on the function of a tribunal. Resp. Bf. 7 n.2. But, *Wiener* made it unmistakably clear that the "most reliable" evidence of the nature of a tribunal is not, as the Secretary would have it, the tribunal's position on a government organization chart or provision of definite terms for its members or both. The most reliable evidence "is the nature of the *function* that Congress vested in" the tribunal. 357 U.S. at 353 (emphasis added).

of Congress nine years before when the relevant LHWCA amendments were enacted) become "a clear congressional understanding" of the import of the amendments. Resp. Bf. 11; *see* Pet. 18-19 & n.33. In none of these instances do the facts support the Secretary's conclusions.

3. The Secretary's challenge to our standing to make the separation of powers and due process points in our petition is misconceived. We are not asking this Court to declare the LHWCA unconstitutional, as the Secretary seems to think. Resp. Bf. 12; Pet. 20 n.35. Our position is only that the Secretary's construction of the LHWCA raises serious separation of powers and due process problems and should therefore be rejected (among other reasons) under the familiar rule of construction that requires courts to avoid bringing a statute into constitutional doubt. Pet. 20. As the Secretary recognizes elsewhere (Resp. Bf. 5), our claim rests on the LHWCA and the fact that that claim is also supported by the constitutional points we have made does not mean that we rest it "'on the legal rights or interests of third parties.'" Resp. Bf. 12, quoting *Warth* v. *Seldin*, 422 U.S. 490, 499 (1975).

4. The Secretary claims that the separation of powers issue in this case is controlled by *Crowell* v. *Benson*, 285 U.S. 22 (1932), because the deputy commissioners there were not Article III judges. Resp. Bf. 13-14.[7] We never said that they were. What we did say was (a) that the separation of powers doctrine prohibits assignment of part of the core judicial power to an *executive* officer and (b) that because the deputy commissioners in *Crowell* were part of an independent agency—not the Executive Branch—*Crowell* cannot be dispositive here. The Secretary has missed our point.[8]

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[7] Not once in his brief does the Secretary mention the "private rights" doctrine, much less come to grips with its importance for the Article III issues in this case. *See* Pet. 21-23.

[8] The Secretary also points out in this connection that the Courts of Appeals duplicate the Board's functions. The point is more

When the dust settles on due process, it appears that the Secretary has found one decision, *Marcello* v. *Bonds*, 349 U.S. 302, 311 (1955), involving a challenge to the fairness of an adjudication scheme on grounds similar to those here. But the due process problem here is not simply that the adjudicator has been subjected to the control of "officials . . . charged with investigative and prosecutive functions," as was true in *Marcello*. *See id.* It embraces the fact that the Secretary, through his stand-in, the Director, is present in the courtroom, vigorously advocating his views to judges who, the Secretary says, hold their jobs at his pleasure. The cases we have cited, some decided since *Marcello*, do not permit a judicial officer to be subjected to such coercion. *See* Pet. 23-25. Moreover, in *Marcello*, the Court clearly limited its holding to deportation proceedings, which were characterized by "long-standing practice" and presented "special considerations applicable to deportation which the Congress may take into account in exercising its particularly broad discretion in immigration matters." 349 U.S. at 311. No long-standing practice or special considerations exist to justify the due process nightmare that the Secretary contemplates here.

* * * *

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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theoretical than real. This Court recently found that only one out of ten cases that reach the Board are also appealed to the Courts of Appeals, and only 0.1 per cent of all injury cases are. *See* Morrison-Knudsen Constr. Co. v. Director, OWCP, 51 U.S.L.W. 4607, 4610 n.13 (May 24, 1983).

82-1686

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

ISMENE M. KALARIS,
Administrative Appeals Judge, and
JULIUS MILLER,
Administrative Appeals Judge,
Petitioners,

v.

RAYMOND J. DONOVAN,
Secretary of Labor,
MALCOLM R. LOVELL, JR.,
Under Secretary of Labor, and
ROBERT L. RAMSEY,
Chief Administrative Appeals Judge,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

[redacted] BRIEF OF AMICI CURIAE

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF AMICI CURIAE

INTEREST OF THOMAS C. FITZHUGH, III AND STEPHEN M. VAUGHAN

Amici curiae are attorneys licensed to practice law in the State of Texas, and each has practiced in that state in the City of Houston for the past several years. During

that period, much of their practice has been involved in cases arising under the Longshoremen's and Harbor Workers' Compensation Act (hereafter LHWCA), 33 U.S.C. 901 *et seq.*, and its various extensions.[1]

Amicus Fitzhugh has been involved exclusively in defense of claims brought under the LHWCA by representing employers, insurance carriers, and self-insured employers. *Amicus* Vaughan's experience has been primarily concerned in representing claimants. Therefore, *amici curiae* have been involved on both sides of such proceedings and are often adversaries in cases arising under the LHWCA.

Due to their extensive experience *amici curiae* have in regard to the operation of the LHWCA, and each has participated several times as lecturers to national conferences on the LHWCA, and each is recognized as a legal expert in that area of the law. *Amici curiae* have a compelling interest in the orderly administration of claims under the LHWCA. *Amici curiae* strongly contend that public policy reasons support the Petitioners in this case.

Petitioners have cogently presented to the Court the statement of the case, the questions presented, and have set forth the jurisdiction of this Court, along with the Constitutional provisions, statutes, and regulations involved in this matter. *Amici curiae* fully agree with the propositions presented by Petitioners for granting review

1. Defense Base Act, 42 U.S.C. § 1651 *et seq.* (1976 and Supp. IV 1980); Nonappropriated Fund Instrumentalities Act, 5 U.S.C. § 8171 *et seq.* (1976 and Supp. V 1981); Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.* (1976 and Supp. IV 1980); District of Columbia Workers' Compensation Act, 36 D.C. Code § 501 *et seq.* (1981).

in this case. However, significant factors which impact *amici curiae* and others involved in the daily administration of claims arising under the LHWCA should be considered in the resolution of this controversy by this Court.

ARGUMENT: REASONS FOR GRANTING THE WRIT

I.

The Decision Below Denies Party Litigants Under the LHWCA Due Process of Law

The decision below stands for the proposition that Administrative Appeals Judges of the Benefits Review Board can be summarily dismissed without cause or without a hearing. If this decision stands, it will render the Administrative Appeal Judges accountable solely to the Secretary of Labor.[2] Allowing the Secretary (hereafter "the Secretary") such direct influence over the Benefits Review Board deprives litigants before the Board (which often includes the Secretary) of the fair and impartial consideration of their cases in this judicial setting guaranteed them by the Due Process Clause.

The LHWCA extends benefits to a vast and varied group of American workers. In addition to Longshoremen and shipyard workers, the Act, through its extensions, applies, inter alia, to the members of the peacekeeping force in the Sinai desert, to civilian employees of defense contractors working abroad, to most of the workers drilling for oil and gas on the outer continental shelf, to commissary and club employees on all United States

2. *Kalaris v. Donovan*, 697 F.2d 376, at 388, n.45; at 391, n.60; at 397, n.87 (D.C. Cir. 1983).

military bases, and to the workers of the District of Columbia.[3] The financial impact of the LHWCA is likewise significant. For example, a 23 year-old offshore worker earning $1,000 per week, if totally and permanently disabled, would receive more than $7,291,795 if he lived to his projected life expectancy.[4] If his wife (same age) survived his death and lived her normal life expectancy, she could receive an additional $1,878,318 in compensation benefits alone.[5] The LHWCA would also provide the injured worker with medical treatment for life,[6] and an allowance for funeral benefits would be paid upon his death.[7] The value of the claims that could be filed by this one offshore worker approaches $10 million. With hundreds of thousands of employees covered by the LHWCA, the impact of biased decisions from the Benefits Review Board can readily be seen.

At oral argument, Judge Wald questioned the government's counsel regarding the government's position. Specifically, she asked whether the Secretary could remove Board members following rendition of a decision the Secretary considered unacceptable. The government's attorney responded that the Secretary would have that power. Judge Wald then asked if the Secretary could direct Board members to reach a certain result prior to hearing a case. Again the government's attorney indicated that the Secretary should have this power. The opinion of the court below leaves no doubt that the Secretary, by utilizing the

3. *Id.*

4. 33 U.S.C. § 908(c)(21), § 910(f).

5. *Id.*, § 909(b), § 910(f).

6. *Id.*, § 907.

7. *Id.*, § 909(a).

power to remove, has the direct power to influence the decisions of the Benefits Review Board.[8] Thus, the Benefits Review Board, as viewed by the court below, has no independence, but is simply an extension of the Secretary. In reaching this conclusion, the court specifically did *not* decide the due process problem that would arise from claims of unfairness made by parties litigating before the Board.[9]

Amici curiae, on the other hand, are directly affected, as are their clients, by the potential unfairness in such a situation.

The Secretary of Labor, through his delegatee, the Director, OWCP, has the right by statute and by regulation to participate in proceedings before the Benefits Review Board.[10] As a result of the court below's decision, the Secretary also has the right to control the outcome of decisions of the Board. The bias in this arrangement is patent and obvious. The situation created by these results should not be allowed to stand. It is more egregious than the system which the Ninth Circuit found denied due process in *United Farm Workers of America, AFL-CIO v. Arizona Agricultural Employment Relations Board*, 696 F.2d 1216 (9th Cir. 1983).

The Arizona Agricultural Employment Relations Board (AERB)[11] was composed of members appointed by the

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8. "[W]e find that Congress did not intend to make the Board independent of the Secretary [of Labor]." *Kalaris v. Donovan*, 697 F.2d 376, 381; 391, n.60 (D.C. Cir. 1983).

9. *Id.* at 399, "The removed members have not raised and could not raise due process allegations here because they cannot be subject to potential unfairness in adjudication the process protects against." n.91.

10. *E.g.*, 20 C.F.R. § 702.147(b).

11. ARIZ. REV. STAT. ANN. §§ 23-1386 to 23-1391 (Supp. 1981).

governor. The state act specified that two members would be appointed as representatives of employers, two would represent unions, and three would represent the general public. The United Farm Workers contended the composition of the AERB was unconstitutional in that having employer representatives on the AERB would make them biased against the United Farm Workers and deprive it of an impartial tribunal in any cases it might bring to the board. The Ninth Circuit held the state act unconstitutional on its face "because we conclude that the act's requirement that the AERB contain members who represent labor and employer interests deprives parties of the impartiality required of the due process clause."[12] Relying on *Tumey v. Ohio*, 273 U.S. 510 (1927), the court concluded:

> "[T]hat unconstitutional bias exists whenever favoritism or animosity toward a party, or purely personal interests of the decision maker, *might* tempt the decision maker to decide on the basis of his feelings toward a party or his purely personal interests." (Footnote omitted). (Emphasis supplied).[13]

The scheme struck down by the Ninth Circuit involved a board composed of a variety of interests, any one of which might have been biased. The composition of the Benefits Review Board, as interpreted by the court below, is far more invidious in its potential for abuse. In the scheme resulting from the decision below, not only is the Secretary permitted to retain his role as an advocate before the Board, but he is freely allowed to dictate the

12. 696 F.2d at 1219.

13. *Id.* at 1220.

decision of the Board, regardless of its impact on other parties.

This Court has frequently interpreted the 1972 Amendments to the LHWCA.[14] In those cases, it has permitted the Director, OWCP, to participate in the arguments of the cases before it.[15] In some instances, the Director directly opposed the result reached by the Board, and in other circumstances the Director supported the Board's decisions.[16] This clearly demonstrates that the interests of the Director have not in the past been synonymous with the decisions of the Board. However, should the decision reached below stand, these interests would become synonymous, as Board members would have the "sword of Damocles"[17] hanging over their head should they decide cases contrary to the position set out by the Director and adopted by the Secretary.

The Court of Appeals overlooked its own carefully drawn distinction concerning impartiality for rulemaking purposes and impartiality for adjudicatory purposes created in *Association of National Advertisers v. FTC.*[18]

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14. E.g., *Director, OWCP v. Perini N. River Assocs.*, ___U.S. ___, 103 S.Ct. 634 (1983); *United States Industries v. Director, OWCP*, 455 U.S. 608, 102 S.Ct. 1312 (1982); *Potomac Elec. Power Co. v. Director, OWCP*, 449 U.S. 268 (1980); *P. C. Pfeiffer Co. v. Ford*, 444 U.S. 69 (1979); *Director, OWCP v. Rasmussen*, 440 U.S. 29 (1979); *Northeast Marine Terminal Co. v. Caputo*, 432 U.S. 249 (1977).

15. *Id.*

16. *Id.*

17. *Wiener v. United States*, 357 U.S. 349, 356 (1958). *See also* K. Davis, *Administrative Law of the Seventies* (1976), § 1.09 at 13-14.

18. 201 U.S. App. D.C. 165, 627 F.2d 1151 (1979), *cert. denied*, 447 U.S. 921 (1980).

There is no dispute that the Benefits Review Board is purely an adjudicatory body. The court below also ignored its holding in *Cinderella Career and Finishing Schools v. FTC*[19] in which it held that the test for disqualification in an adjudicatory proceeding was:

> "Whether a disinterested observer may conclude that [the agency] had in some measure adjudged the facts as well as the law of a particular case in advance of hearing it."[20]

Such advance judgment of the facts and laws by the judges of the Benefits Review Board, as mandated by the Court below, is precisely the situation created by the Court of Appeals decision. *Amici curiae* stand before the Court to represent those parties who will participate in claims before the Benefits Review Board and who will not have an impartial tribunal to adjudicate their disputes.

The fundamental principle of the decision below is that the Secretary of Labor can dictate the results of cases to be decided by the Benefits Review Board. This is constitutionally impermissible, and the decision below adversely affects the rights of the litigants before the Board to an impartial hearing and to the due process of law afforded by the Constitution of the United States.[21]

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19. 138 U.S. App. D.C. 152, 425 F.2d 583 (1970).

20. *United Farm Workers of America, AFL-CIO v. Ariz. Agr. Empl. Rel. Bd.*, 696 F.2d 1216, 1221 (9th Cir. 1983).

21. United States Constitution, 5th Amendment.

II.

The LHWCA As Construed Violates The Due Process Clause.

This Court discussed due process requirements in enforcing a federal statute in *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980). Writing for an unanimous court, Justice Marshall concluded:

> "The due process clause entitles a person to an impartial and disinterested tribunal in both civil and criminal cases. The requirement of neutrality in adjudicative proceedings safeguards the two central concerns of procedural due process, the prevention of unjustified or mistaken deprivations and that promotion of participation affected individuals in the decision-making process. [Cit. omitted] The neutrality requirement helps to guarantee that life, liberty, or property will not be taken on the basis of an erroneous or distorted conception of the facts or the law. [Cit. omitted] At the same time, it preserves both the appearance and reality of fairness, 'generating the feeling, so important to a popular government, that justice has been done.' *Joint Anti-Fascist Committee v. McGrath*, 341 U.S. 123 (1951) (Frankfurter, J., concurring), by insuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him. *The requirement of neutrality has been jealously guarded by this Court.*"[22] (Emphasis supplied.)

The interpretation of the Act given by the court below creates an impermissible and biased situation in the administration of the Act. The Act gives the Secretary,

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22. 446 U.S. at 242.

who has delegated the authority to the Director, Office of Workers' Compensation Programs, the right to participate in proceedings before the Board. This right has been further recognized by the Courts of Appeals as an absolute right of the Director, as the Secretary's delegatee, to intervene in cases that involve interpretation of the Act, *e.g., Ingalls Shipbuilding v. White,* 681 F.2d 275 (5th Cir. 1982); *Shahady v. Atlas Tile & Marble Co.,* 673 F.2d 479 (D.C. Cir. 1982). This Court has frequently discussed the status of the Director as a proper party in litigation. Most recently this issue was addressed in *Director, OWCP v. Perini North River Assocs.* (hereafter *"Churchill"*).[23]

III.

The LHWCA As Construed Violates The Separation of Powers Doctrine.

In *Churchill* the Court discussed situations in which the Director, OWCP, and the Benefits Review Board took differing views of important questions involving interpretation of the LHWCA.[24] The recognition of such differing views is strong evidence that this Court considers the Board independent of the Director. If, as the court below suggests, the Benefits Review Board is nothing but an extension of the Secretary, this Court and other appellate courts could not become involved in deciding disputes between the Director and the Benefits Review Board, for to do so would be to involved in deciding disputes between the Director and the Benefits Review Board for to do so would be to inject the judicial system into the midst of an administra-

23. ____U.S.____, 103 S.Ct. 634 (1983).

24. *Id.*, at 640, n.11.

tive squabble among officers of the same cabinet department. The fact that this Court's opinion in *Churchill* was published eight days after the court below's decision may be viewed as effectively vitiating the interpretation of the relationship of the Benefits Review Board to the Secretary of Labor contained in that decision. The court below's position would place the Secretary not only as a participant in litigation through the Director, OWCP's office, but would also allow him to be the judge of his own issues by directly influencing the decisions of the Board. The party litigants—the injured workers, their employers and insurers, the parties whose financial (i.e. property) rights are at issue—would be mere spectators to Board actions and would have the results dictated without any independent adjudication of the issues in their various cases.

If such a situation existed, there would be no standing for the Director to appeal decisions of the Board he considered adverse, nor would any justiciable controversy be presented to any court for resolution. One office inside the Department of Labor would simply be disagreeing with another office inside the Department of Labor, all under the control of the Secretary. This cannot be the result Congress intended. Nor, as one surveys the cases which have developed under the amended statute, can one conceive such results were contemplated or considered by any of the courts which have faced the issue squarely. However, that result is the only outcome if the decision below is permitted to stand.

The decision below has prompted a series of lawsuits by parties involved in LHWCA litigation.[25] These suits

25. *Hudson v. Donovan,* No. G-83-31, S.D. Texas, Galveston Div'n; *Church v. Donovan,* Civil No. H-83-70, D. Conn.; *Silliman v. Donovan,* No. C-830991RPA, N.D. Cal.

challenge the attempted removal of the appellants on grounds that such action violates the due process rights of party litigants who appear before the Benefits Review Board. By granting the writ in this case, the Court could effectively terminate additional litigation on this point and could conclusively establish the rights of party litigants to a fair and unbiased hearing before the Benefits Review Board. More importantly, if litigants lose confidence in the impartiality of the Benefits Review Board, appeals of its decisions to the overloaded Courts of Appeals and to this Court will inevitably increase.

IV.

The Decision Below Conflicts With The LHWCA And Decisions Of Other Circuit Courts Construing That Statute.

In legal proceedings, the Benefits Review Board has been treated as a separate entity from the Secretary of Labor.[26] The Secretary, acting through the Director, OWCP, has participated in proceedings before the Board advocating the views of the Secretary. On several occasions the Director, dissatisfied with the decision of the Board, has petitioned for review in the Circuit Courts of Appeals.[27] In some circuits the Director has been given automatic standing to participate in appeals from decisions of the Benefits Review Board. *Viz., Ingalls v. White,* 681 F.2d 275 (5th Cir. 1982); *Shahady v. Atlas Tile & Marble Co.,* 673 F. 2d 479 (D.C. Cir. 1982); *Director, OWCP v. Eastern*

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26. *See* notes 13-15, *supra.*

27. *E.g., Ingalls v. White,* 681 F.2d 275 (5th Cir. 1982); *Shahady v. Atlas Tile & Marble Co.,* 673 F.2d 479 (D.C. Cir. 1982).

Coal Corp., 561 F.2d 632 (6th Cir. 1977); *Underhill v. Peabody Coal Co.*, 637 F.2d 217 (7th Cir. 1982).

In *Director, OWCP v. Rasmussen*, 440 U.S. 29 (1979), the Director disagreed with the Benefits Review Board's position that death benefits were not subject to maximum compensation limits contained in the Act. The Court of Appeals and this Court agreed with the Benefits Review Board, rejecting the arguments of the Director.

The court below views the Board as not independent of the Secretary. However, this Court in *U. S. Industries v. Director, OWCP*, ____U.S.____, 102 S.Ct. 1312 (1982), *Rasmussen, supra*, and most recently in *Churchill* has viewed the Board as independent of the Secretary and of the Director.

The District of Columbia Circuit now clearly conflicts with the view of the Ninth Circuit, which has held; "neither the Secretary of Labor nor the OWCP can dictate to the Benefits Review Board the manner in which the [Act] should be interpreted . . . nor [can the Secretary determine] the outcome of [the claims] process." *Boating Industries Association v. Marshall*, 601 F.2d 1376, 1382 (9th Cir. 1979). Such a result is strengthened by reference to the terms of the statute itself. Section 921(b)(4) states that:

> the Board *may*, on its own Motion *or at the request of the Secretary*, remand a case to the hearing examiners for further appropriate action. *The consent of the parties in interest shall not be a prerequisite to a remand by the Board.* (Emphasis supplied.)[28]

28. 33 U.S.C. § 921(b)(4) (1976 and Supp. V. 1981).

The court below acknowledged that this section was germane to determining "whether the Board is free from substantive agency oversight or review."[29] However, the court below was concerned with the Article III *vel non* status of the Benefits Review Board judges and not with the due process rights of party litigants.[30]

CONCLUSION

To permit the Secretary of Labor to remove a majority of the Benefits Review Board without cause and without a hearing is to permit the Secretary to directly influence the Board and its decision making process. Such a move, which is not countenanced by the statute, directly interferes with the rights of party litigants to a fair and impartial adjudication of their disputes by the Benefits Review Board. The sword of Damocles hangs over the head of Board members and, as the court below indicated, will render them totally susceptible to the direction of the Secretary. Thus party litigants are left to appeal to a kangaroo court, one in which the Secretary not only appoints the judges, but participates as a party in interest and then dictates the results. This is hardly justice and certainly not the due process to which party litigants are entitled.

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29. *Kalaris v. Donovan*, 697 F.2d 376, 388, n.45 (D.C. Cir. 1983).

30. *Id.*, 697 F.2d at 399, n.91.

WHEREFORE, PREMISES CONSIDERED, *amici curiae* respectfully request the Court to grant the Petition to the Court of Appeals, to reverse its judgment, and then affirm the judgment of the District Court.

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